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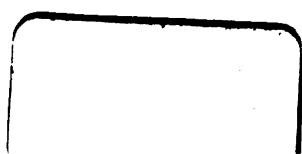
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INCLUDING

LEADING CASES

VOLUME II

EDITOR IN CHIEF

HON. CHARLES E. CHADMAN, LL.B., LL.M., LL.D.

ASSISTED BY

A CORPS OF LEGAL EXPERTS

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PREFACE.

This treatise has been prepared as a handbook for the use of students-at-law, and for that great class of citizens who, in fitting themselves for intelligent voting, are willing to make a brief study of political and legal science. It aims to present in plain and concise form the fundamental law of the State and Nation, together with the rules and decisions which have accumulated in the construction and application of constitutional provisions.

It is believed that a consideration of constitutional principles should come first in the study of American law. The Constitution in our system is the supreme and fundamental as well as the more general law of the land, and its principles form a fitting base upon which to begin the structure of a legal education. On account of the breadth of the subject, a number of writers have taken occasion to treat concurrently with it, subjects, which are planned to be treated separately in the Cyclopedia of Law. To avoid repetition, we have not entered upon a consideration at length of any branch that is to be presented in a subsequent number of this series.

Recognizing, as we do, that it is not the province of the law-writer to make the law, yet in a few instances we have felt it our duty to call attention in the foot-notes to certain changes and improvements that should be

PREFACE.

made in our political system, and to criticise, where criticism seemed necessary, those errors and fallacies that have crept into judicial and legislative action.

The purpose of law is to apply justice. In establishing and interpreting law, man exercises a God-like function. When the law is honestly made and administered its precepts will tend to approach and to conform to the highest and truest principles of right cherished by all good men. Any law which does not satisfy justice and conform to these principles is *prima facie* a bad law; and it becomes the right and duty of every citizen to oppose with his vote the continuance of such unjust law.

A study of law in this sense—as principles of justice and right—must ever prove the most beneficent of educative influences.

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FEDERAL CONSTITUTIONAL LAW.

CHAPTER I.

ORIGIN OF THE UNITED STATES.

Sec. 51.* PROSPECT AND RETROSPECT.

—Standing at the threshold of a new century we ask: What shall the years bring forth in social and political institutions? What new forces are to inspire and direct the American people? These questions we can only tentatively answer. But we need not blindly speculate on the causes which shaped the laws and moulded the institutions of the present. Turning to the past we see spread out before us as for review the interesting and novel spectacle of a world accidentally discovered, reclaimed from savage nations, repopulated and transformed into a great and powerful nation,—conglomerate in people and unified in government. Nothing in the long line of political development in the ages gone by compares with this Aladdin-like unfolding of the western world. A trackless continent inhabited only by savages, opened up, settled, civilized, populated and nationalized in the course of a few hundred years!

*The first fifty sections will be found in Volume I of the *Cyclopedia of Law*, entitled "How to Study Law."

The birth of a nation has taken place, and the new nation has turned back its products—material, social and political—to astonish and revolutionize the very nations of the Old World, whose transplanted sons developed the New.

These events, while recent, are of such transcendent importance as to warrant the most careful and assiduous attention and study. In the Charters and Constitutions of a free people; in the laws and decisions formulated under a democratic-republican government we may discover not only the causes of our present greatness, but also the principles which afford the true solution of our political and social problems. Volumes would be necessary to recount in detail the essential features of this transformation of an alien and heterogeneous people into a homogeneous nation with an expansive code of laws and morals and with well-defined and high ideals of government and natural justice. But it is the basic principles, and leading decisions, that the student of present laws and institutions needs to grasp, and these it is possible to present within a comparatively small compass.

Sec. 52. **DISCOVERY.**—The Northmen visited America as early as 1000 A. D., but their visits were transitory, and it was reserved for Columbus, while seeking by the advice of Toscanelli to prove that the world was round, and that by sailing west he could reach the east, to reveal in 1492 to the nations of Europe the vast territory of the New World, at first supposed to be the coast of India. Columbus found the

land occupied by an uncivilized people, who, living by hunting and fishing, were not considered to have an indefeasible title. He landed and planted the flag of Spain, declaring by this act that the land belonged to the Spanish throne by right of first discovery. Later this title by discovery was to be strengthened and confirmed by settlement, and the power of Spain over a portion of America fixed to continue until the last days of the nineteenth century.

Columbus' discovery thrilled Europe. The one thing left in the world that seemed worth doing had been accomplished. An escape from the confining pressure of conservatism was made possible, and the despair of the familiar and habitual gave place to the glad hope of a coming dawn that would emancipate and enlighten the human race.* The leading nations of Europe flocked to the new land to plant their flags and lay claim to the territory.

Sec. 53. DIVIDING THE SPOILS.—The occupancy of the Indians being considered too vague and undefined to be respected by the Europeans, the question was, not how to dispossess the Indians, but rather how to secure superior claims as against competing nations. The first international dispute in regard to the new territory was settled, as many matters were at that day, by the Pope. In 1494, Spain and Portugal, then leading maritime nations, made a compact sanctioned by Pope Alexander VI., by which all land west of a

*Julian Hawthorne, "History United States," I., 17.

line 870 leagues to the west of the Cape Verde Islands should belong to Spain, while all heathen coast east of such line should belong to Portugal. This compact, if recognized, would have excluded all other nations from the new world. England laid claim to all territory between the 56th and 88th degrees of north latitude, by virtue of the discovery and exploration of the coast by John Cabot in 1495, and began settlements in this territory during the latter part of the sixteenth century. France, though contented for nearly a century to fish off the coast of Newfoundland, also began settlements, and her king, Francis I., laughed at the claims of Spain and Portugal to the whole of the new continent. He urged that they were not the sole heirs of Father Adam, and if they were they should publish the will.*

England, France, Spain, Holland and Portugal each claimed portions of the American continent and proceeded to make good their claims by establishing settlements. A goodly portion of the early history of our country is taken up with the disputes between these different nations for supremacy. How England and France finally became superior in North America, Spain in Cuba, Central, and South America, and Portugal in Brazil, is recounted in every school history and need not be taken up here. The claim of France to Louisiana

*This argument of Francis I. was a valid one, and is similar to that urged by Herbert Spencer in "Social Statics," Ch. IX., against individual property in land. Spencer affirms that "the right of mankind at large to the earth's surface is still valid; all deeds, customs and laws notwithstanding."

was purchased by the United States in 1803, and all the vast territory west of the Mississippi became an integral part of our nation.—J. Fiske, "Hist. of the United States."

Sec. 54. THE ENGLISH COLONIES.—The first settlements in America were weak and had at first the semblance of camps of adventurers rather than of stable colonies. The earliest political organizations of the settlers, while to some extent haphazard and experimental, were so restrained and directed by the inborn political ideals of Englishmen as to fall within the trend of former development, and to correspond in general with the plans of the mother country to whom they owed allegiance. The British Crown from the first asserted its power to lay down the frame of government by which the colonists were to be ruled, but there was no uniformity in the exercise of this power. We recount briefly the political development of several of the colonies:

Virginia. In 1606 James I. granted the London and Plymouth companies—commercial and colonizing corporations—a charter to large tracts of land in America. The colonists were to be under the immediate control of a council composed of residents, but appointed by the king; this council was subordinate to another in England, and the latter under the control of the king. One-fifth of the precious metals produced was to go to the king, and a duty was laid on alien traffic. The emigrants and their children were permitted to retain the character of free English people. The company held

the charter and under it governed the colony. The people of Virginia were not satisfied with their rights under this charter, and demanded of the London Company the immemorial right of Englishmen to participate in the government. Since 1265, the date of the Simon de Montfort Parliament, the towns and counties in England had enjoyed a representation in the House of Commons, and this assembly had established the principle that it alone could vote the levy of taxes. The people of Virginia in 1619 established a local assembly in which eleven districts were represented by two members, or "burgesses," each, and this assembly from its first meeting, July 30, 1619, claimed the sole power of levying taxes. Among these burgesses was a man named Jefferson, and 157 years later one of his descendants drafted the Declaration of Independence. In 1624, King James annulled the charter of the company, and Virginia came directly under the Crown as a Royal Province. But the House of Burgesses continued to hold the purse and assert its power in local matters.

New England Colonies. The Pilgrim Fathers who landed at Plymouth on the 21st of November, 1620, had no charter, and their government for a considerable period may be called a voluntary association. In the cabin of the Mayflower they drew up a compact in which they agreed to make and to submit to such laws as were needed for the general good. In 1630 a number of Puritans started Massachusetts Bay Colony, under a charter from Charles I. Under their charter,

which was an extremely liberal one for that time, they could make any laws they liked for themselves if not in conflict with the laws of England. They were thus allowed to establish themselves in self-governing communities. The Puritan settlers came over in groups led by their ministers and settled in parishes or townships. Each of the settlements established a church and the inhabitants and congregation were identical. When they met for church purposes it was a parish meeting, and for civil purposes, as building roads, school houses, etc., it was called a town meeting. Thus were established the local self-governing communities which have continued to find favor in New England to the present time.

Sec. 55. SAME SUBJECT—FIRST WRITTEN CONSTITUTION IN AMERICA.—Connecticut, which was founded from the Massachusetts colonies as a protest against religious bigotry, affords the first instance in the history of the world of a State formed by a written constitution. In the Puritan settlements of Massachusetts only church members were allowed to vote. This restriction soon became oppressive, and Thomas Hooker, a liberal Puritan, headed the opposition. Hooker maintained that all the people should be participators in the common government; while Governor Winthrop asserted that a large part of the people were unfit to take any part in the government, and that the best and wisest church-members should conduct the government for the good of all. This is the first recorded contest between aristocracy and

democracy in the New World. The battle was a draw. The democratic and liberal element withdrew westward and left the conservatives in the old field.* Hooker and his followers journeyed into Connecticut and founded Hartford, Windsor, and Wethersfield. In 1639 the people of these three towns met at Hartford and agreed to govern themselves according to a written Constitution. By the Constitution there was no restriction of the suffrage to church members; the three towns were united into a republic; there was no mention of a king, and the people themselves were the only recognized political authority. In 1662 Connecticut received a liberal charter which, in substance, confirmed this constitution.

Sec. 56. SAME SUBJECT — THE NEW ENGLAND CONFEDERATION. — The first league, or confederation, between distinct American colonies was established in New England in 1643. The four colonies of Massachusetts, Plymouth, Connecticut

*The founding of Connecticut strikingly illustrates the desire of liberalism and democracy to avoid, where possible, all contests with the conservative and reactionary element. As Jefferson wrote, in later years, "all experience hath shown that mankind are more disposed to suffer while evils are sufferable than to right themselves, etc.," the political history of America has proven. The democratic element have faced the frontier and conquered the wilderness rather than sacrifice their opinions. The East delights to honor the forms and customs of Europe, and looks backward rather than forward, while the West, with unlimited trust in democratic ideals, advances and adopts new methods for their fuller realization.

and New Haven formed a league for the purpose of defense against the Indians. The confederation was called "The United Colonies of New England," and its affairs were managed by a board of eight commissioners. This board, composed of two members from each of the four colonies, had power to call out troops in defense of, and settle disputes between, the Colonies. The internal affairs of the Colonies were not disturbed by the league. This confederation existed for the purposes mentioned until 1684, when Sir Edmund Andros arrived to govern all of New England as a viceroy.—Fiske, "Hist. of the United States," Ch. vi.

Sec. 57. SAME SUBJECT—MARYLAND AND PENNSYLVANIA.—Examples of proprietary government are furnished by the colonies of Pennsylvania and Maryland. Charles I., in 1629, granted to Lord Baltimore the territory of Maryland. Baltimore was made "Lord Proprietary," with full power over the destiny of the colony upon rendering the king two Indian arrows yearly as homage, and a fifth part of the precious metals discovered. This office was hereditary and continued save for a brief interval until Independence. In the same manner William Penn was granted the territory of Pennsylvania by Charles II. Penn's power over the colony was not as plenary as that of Lord Baltimore. Laws passed by the assembly in Pennsylvania had to be sent to the king or privy council for approval, while Lord Baltimore alone signed laws passed in Maryland. In Maryland the right of the

British government to impose taxes was denied, while in Pennsylvania it was expressly asserted in the grant.

Sec. 58. COLONIAL GOVERNMENTS.—In the thirteen colonies subject to England, and from which the United States of America was to be formed, a variety of governments existed prior to the formation of the American Union. The following three forms obtained at the time of the Revolution:

Provincial Government. Under this system the colony was regarded as a direct appanage of the Crown. A governor was appointed by the king to be the executive head of the colony, with the right to veto local legislation and the power to appoint judges and establish courts. A council appointed by the king acted as the upper house of the local legislature, while an assembly of representatives chosen by the people constituted the lower house. This form of government prevailed with modifications in Virginia, North Carolina, South Carolina, Georgia, New Hampshire, New York and New Jersey.

Charter Government. A charter is a written instrument formally expressed and executed and given as evidence of a grant or contract. The king had in a number of instances laid down the frame of government for a colony by a charter or grant, which invested the inhabitants with certain general powers of local self-government. Massachusetts, Rhode Island and Connecticut had charter governments. In Massachusetts the king appointed the governor; but in Rhode Island and Connecticut the charter allowed the people to elect

their governor, council, and assembly, and appoint other officers.—Black, Const. Law, 84-85.

Proprietary Government. In several colonies the executive power had been bestowed by the king upon individuals, who held the territory upon the condition of making certain slight returns to the Crown in token of the over-lordship retained by the king. Maryland, Pennsylvania and Delaware were proprietary governments.

Under each of these forms of government the colonists laid claim to the rights of British subjects and to the protection of the common law. They enjoyed quite generally the privilege of local self-government and the right of voting the taxes; and their assemblies,—modeled after the House of Commons,—reasserted all the immunities against royal oppression gained by the centuries of struggle in England.

Sec. 59. GROUNDS OF DISPUTE WITH THE MOTHER COUNTRY.—The Colonies admitted that they were a portion of the British dominions, and conceded that they were subject to the control of the Crown and Parliament in all matters of imperial concern, under which head fell foreign affairs and commerce with the mother country and other nations. But they felt that they had the right to self-government in matters which concerned themselves solely. They asserted, as their forefathers had done, the right to be taxed only when their representatives voted the tax. These claims the Crown and Parliament were not ready to concede, and later, when repealing the Stamp Act,

Parliament laid claim to the unqualified authority to bind the Colonies by legislation in all cases whatsoever. —I. Story, Const., Secs. 159-197.

Furthermore, England pursued a policy of oppression toward the Colonies in regarding them as dependent plantations to be systematically robbed for the benefit of the mother country. Acting on the presumption that in trading one or the other party must get the best of the bargain, Parliament legislated to worst the Colonies. The colonists were prohibited from manufacturing; they could only buy from or sell to the mother country; their carrying trade was limited to British ships, and a prohibitory tariff had been put upon American corn, to protect the British landlords and farmers.

Sec. 60. ATTEMPT AT A FEDERAL UNION.

—Up to this time no attempt had been made to weld together the group of English colonies in America. The first plan of Union was formulated by that far-seeing and versatile genius, Benjamin Franklin. The expensive campaigns which had been conducted against the French and Indians revealed the need of some central power, with the right to enlist troops and levy taxes for the support of a common enterprise. In 1754, seven Colonies sent delegates to a Congress at Albany to secure the aid of the Indians; Franklin was present and proposed a plan of Union for the Colonies, since known as the "Albany Plan." By his plan the Colonies were to elect a Grand Council, to meet once a year at Philadelphia, the Council to have power to levy taxes, sup-

port armies, and be supreme in all matters of general concern. The executive of the united Colonies was to be a President appointed by the Crown, and to have the veto power. The plan was never adopted, as the Colonies were jealous of one another and not ready for union, and the king was averse to having them unite.—I. Kent Com., 204-5.

Sec. 61. **TAXATION WITHOUT REPRESENTATION.**—England insisted that the Colonies directly assist in paying the expense which she had incurred in defending them. A stamp tax was considered the least liable to objection, and the Stamp Act was passed by Parliament in 1765. The tax was not oppressive, but it was levied contrary to the fundamental political tenets of Englishmen and on principle the Colonists resisted. They were not represented in the English Parliament and for that body to tax them in any way would be “taxation without representation.” Further the people of America did not wish to contribute to the support of a foreign army, and one that might be used against them as well as for them. The patriotic eloquence of Adams and Henry was loosened against the Stamp Act, and a storm of indignation followed.

Sec. 62. **THE COLONIES LEARN TO CO-OPERATE.**—As a result of the anti-stamp tax agitation a Colonial Congress was called in 1765. It met in New York City, October 7th. Nine Colonies were represented by twenty-eight delegates. The Congress agreed upon a declaration of rights and a statement of

their grievances. They claimed the right to be free from all taxes not laid down by their own representatives. This statement was sent to England as a joint protest against the Stamp Act. Thus the Colonists had been compelled to adopt Franklin's sage advice, "unite or die."

Sec. 63. THE COLONIES FORCED TO RESIST.—The Stamp Act was repealed in 1766, as resistance had rendered it abortive, but Parliament did not disclaim the right to tax the Colonies. There was a party in England that sympathized with America in her resistance to internal taxation, such as the Stamp Act authorized. The leaders in Parliament proposed to lay import duties on tea and other articles, since the Colonies as yet had not objected to the regulation of imports and external taxation. But as Parliament intended to use the money raised by import duties to pay the salaries of judges, governors and other representatives of the Crown and thus make them independent of the Colonial legislatures for grants, the plan was as objectionable to Americans as the Stamp Act had been. The people pledged themselves not to interrupt dutiable articles. Disputes were constantly occurring between the Colonial legislatures and the Royal governors; in Virginia, the Assembly dismissed by the governor met in the dance hall of the Raleigh Tavern at Williamsburg. The British troops in Boston in 1770 fired on a crowd of people and killed and wounded a number. Parliament in 1772 took off all duties save that on tea; this was reserved to maintain the right to tax the Col-

onists, but as it was this asserted right that the Colonists objected to, the tea ships were unloaded into Boston harbor. The port of Boston was closed by act of Parliament in April, 1774. The Colonies were to be forced to pay taxes. The charter of Massachusetts was annulled and a military governor was appointed.

Sec. 64. SAME SUBJECT—THE FIRST CONTINENTAL CONGRESS.—Such was the condition of affairs with the mother country when the delegates who had been elected in the several Colonies, on the advice of Massachusetts, came together in Philadelphia, September 5, 1774. They were to consult together and frame a common protest against the action of England, and draw up a declaration of rights, setting forth to the king their attitude and demands. This meeting, known as the Continental Congress, was the first practical step toward uniting the Colonies in a revolutionary league. While many of the delegates believed that it was too late to gain their demands save by war, their action was reserved and dignified.* A declaration of rights was

*This Congress appealed to England thus: "To your justice we appeal. You have been told that we are impatient of government and desirous of independence. These are calumnies. Permit us to be as free as yourselves, and we shall ever esteem a union with you to be our greatest glory and our greatest happiness. But if you are determined that your ministers shall wantonly sport with the rights of mankind; if neither the voice of justice, the dictates of law, the principles of the constitution, or the suggestions of humanity, can restrain your hands from shedding human blood in such an impious cause, we must then

sent to England, suspension of commercial intercourse with the mother country was recommended, and, agreeing upon another Congress to meet in May of the following year, they adjourned.

Sec. 65. SECOND CONTINENTAL CONGRESS.—The second Congress met in May, as agreed upon, and its work was now reasonably clear. The skirmish at Lexington and Concord had occurred and the revolution had begun. Congress chose John Hancock as its president, took charge of the force besieging the British in Boston, and appointed Washington as commander-in-chief of the "Continental Army." At all times prior to this the Colonists acknowledged themselves as subject to the British government, and simply claimed the right which the constitution of England guaranteed to them as Englishmen. The individual Colonies were jealous of one another, and had looked with disfavor on attempts at union. So far they had co-operated because their circumstances compelled them to do so, as their interests in the dispute with England were identical. The Second Continental Congress, which met in Philadelphia, May 10, 1775, made no attempt to define the relation which it held to the separate Colonies. The Colonies were all represented in it, and the vote was by Colonies, but there was no compact made by which to determine the sphere of its powers. The delegates of the Colonies simply took charge of the

tell you that we shall never submit to be hewers of wood and drawers of water for any ministry or nation in the world." See Julian Hawthorne, *History United States*, Ch. XIII.

common cause against England by tacit or implied authority. The body was a revolutionary one, and the Colonies were co-operating rather than uniting.—Walker, *Am. Law*, 85; Cooley, *Principles Const. Law*, 8d ed., p. 9.

Sec. 66. THE DECLARATION OF INDEPENDENCE.—Bunker Hill had been fought and yet many Americans hoped for reconciliation with England on the basis of securing their rights. But the persistence of the king strengthened the sentiment in favor of Independence. Several of the Colonies drove out their royal governors and set up new State governments. For a year the war had been carried on, and the Colonists were simply belligerents against their acknowledged government. On the 7th of June, 1776, Richard Henry Lee presented a resolution in Congress that the "United Colonies are, and ought to be, free and independent States; that they are absolved from all allegiance to the British crown, and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved." The vote was postponed for three weeks and a committee appointed to prepare the declaration. Adams, Franklin and Jefferson were members of this committee, and the latter was made chairman and drafted the Declaration of Independence. On July 2d the Colonies unanimously adopted the resolution, and on July 4th the Declaration which had been drawn up to justify their action before the world, was signed by the delegates, and the Colonies became independent States.

There is some dispute as to the effect of the Declaration in transferring sovereignty to the individual Colonies or States. Some writers assert that the States were never free and independent in the full and proper sense of the term, as they were leagued together from the first in some form.—Von Holst, *Const. Law*, 7. While others affirm that the Declaration gave the Colonies the "position of independent States, limited only by the concessions of authority, mostly tacit, which they made to their general Congress."—Cooley, "*Principles*," pp. 3-4. Prior to declaring their Independence the Colonies were subject to England. The Declaration did not change their relation to one another, but did assert that, "as free and independent States, they have full power to levy war, conclude peace, contract alliances, establish commerce, and do all other acts and things which independent States may of right do." There had been no formal union between the Colonies, and perpetual confederation had not been mentioned as yet, and hardly to be implied from their co-operation in resisting England.—Walker, *Am. Law*, 86.

Sec. 67. THE DECLARATION AS FUNDAMENTAL LAW.—The Declaration of Independence was an authoritative public act expressing the unanimous opinion of the various States as to the true nature of government. As a statement of the rights of the sovereign people against established government of whatever kind it has never been controverted or set aside. Just what effect the Declaration has under the Constitution is another matter. Many think its asser-

tions too broad to be applicable. The declared equality has been limited to political equality, and with this restraint Americans have lauded as the mainstay of their liberties the clause reading—

We hold these truths to be self-evident—that all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

This instrument, as drawn by Jefferson, was not a mere excuse for the act of rebelling against Great Britain. It was the heartfelt conviction of the signers of the Declaration—each an earnest student of human institutions and rights—that they were stating their just claims;—claims that would stand for all people and in all times. Hence the Declaration will always have an important bearing upon our political and constitutional history. It may be regarded as the fundamental law of America as to the relation between the sovereign people and their established government.

Sec. 68. THE ARTICLES OF CONFEDERATION.—Since 1774 the Colonies had been working together; they had declared their independence, raised, equipped and directed armies to sustain their rights, but it was not until 1777 that they decided to define the

nature of their connection and declare it perpetual. The Colonies had been jealous of one another, the war had united them to a considerable extent, and the exigencies of their situation impelled them to unite in perpetuity. That their jealousies had not all been forgotten and their desire for union not fully developed is manifest from the character of the compact and the incompleteness of the league formed. On the 15th of November, 1777, the Continental Congress, after considerable discussion, agreed upon a series of "Articles of Confederation and Perpetual Union." These Articles were recommended by Congress to the States for ratification, and were immediately accepted by a majority of the States. This was the first express compact between the States and marks the constitutional birth of the United States as a Nation. The Articles of Confederation were not ratified by all the States until the 1st of March, 1781. The cause of the delay was the unwillingness of some of the States to part with their western lands. In 1781 this land was ceded to the United States for the good of all the States, and the obstacle was removed.—I. Story, Const., Secs. 226-8.

Sec. 69. SAME SUBJECT—A LEAGUE OF STATES.—The Articles of Confederation formed a league between otherwise independent States. They expressly declared that "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States in Congress assembled." The purposes of the league between

the States was "the common defense, the security of their liberties, and their mutual and general welfare." The States bound themselves to assist each other "against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever." The legislative body of the leagued States was an annual Congress of delegates, in which each State was represented equally, each having one vote, and the power to recall their delegates during the year and send others. The only executive provided for was "a committee of the States," consisting of one delegate from each State, to be appointed by and to sit during the recess of Congress. This committee was authorized "to execute such of the powers of Congress as the United States in Congress assembled, by the consent of nine States, shall, from time to time, think expedient to vest them with."

The Articles extended to "the United States in Congress assembled" the power over war, treaties and alliances; authorized the Congress to send and receive ambassadors, establish courts for the trial of felonies and piracies committed on the high seas, make rule for prizes and captures on land, and grant letters of marque and reprisal. Congress had the further power to fix the standard of weights and measures, regulate the alloy and value of coin struck, emit bills of credit and borrow money on the credit of the United States, establish and regulate postoffices, appoint superior officers in the army and navy, make rules for the government of the land and naval forces, and direct their operations,

to regulate trade and manage affairs with the Indians, and to act as the last resort on appeal in all disputes and differences between the States on questions of boundary, jurisdiction, or other cause whatsoever.

The important powers granted to Congress were not to be exercised unless nine States assented to the proposed action of Congress. It was further provided that all expenses incurred for the common defense and general welfare were to be defrayed out of a common treasury, to be supplied by the several States, "in proportion to the value of all land within each State granted to or surveyed for any person, as such land and buildings and improvements thereon shall be estimated, according to such mode as the United States in Congress assembled shall from time to time direct. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed upon by the United States in Congress assembled." The Articles were to be inviolably observed by the States, and the Union was to be perpetual. Alterations were to be agreed to in Congress and confirmed by the legislatures of every State.—Cooley, "Principles," 3d ed., pp. 13-14.

Sec. 70. DEFECTS OF THE CONFEDERATION.—The Articles of Confederation were not satisfactory in uniting the States for their common welfare. Discord and jealousy between the separate States soon weakened the league and made the authority of the "United States in Congress assembled" almost nuga-

tory. The small States could antagonize the larger ones. Congress without revenue or the power to levy taxes could but call upon the States for supplies, and had no power to coerce payment. Without power over commerce and trade, or an executive to enforce its judicial decisions, the central government rapidly lost prestige and significance. Congress could legislate and enter into treaties and alliances, but the States and the people could disregard them with impunity; it was intended as a government, but in practice became an advisory body, as its decrees could be made effective only through the action of sovereign States. It was made apparent that to secure harmony between the States, a central authority must be provided, with power within itself, derived from the sovereign people of all the States, to regulate all matters of general importance.—Federalist, Nos. 15-22; Von Holst, Const. Law, 12. The Confederation proved that unless the powers granted to the general government were self-executing they would be of little avail, as the States, if permitted to exercise an option of obeying or not, were not to be depended upon.—Pomeroy, Const. Law, Secs. 57-75.

Sec. 71. EFFORTS TO PERFECT THE UNION.—The need of reform in the Articles of Confederation was apparent during the war, and before the last State had sanctioned them. The New England States and New York met in convention at Hartford in November, 1780, to devise means of improving the Federal finances. They issued an address to the States in which they suggested the power of the central

government to coerce the States.* It was six years before a similar convention met, but in the meantime the States and the people had realized the necessity of an effective legal consolidation, if peace and freedom were to be enjoyed.—Von Holst, Const. Law, 18-14.

**Sec. 72. SAME SUBJECT—THE ANNAPO-
LIS CONVENTION.**—At the instance of Virginia a call had been made for delegates from the States to establish a better system of commercial regulations. Only six States sent commissioners. They met at Annapolis in September, 1786, and after discussing the critical condition of affairs they recommended the calling of a general convention for the purpose of amending the Articles of Confederation. Congress later passed a similar resolution, and the convention was called to meet in May, 1787.

**Sec. 73. SAME SUBJECT—THE CONSTI-
TUTIONAL CONVENTION.**—In pursuance of the call, all the States sent delegates to the convention save Rhode Island. This State enjoyed, by reason of her situation, peculiar commercial advantages under the Confederation, and she feared that the changes proposed would cause her to lose them. The delegates had been

*A Convention of the New England States held in Boston, August, 1780, declared for a more solid and permanent union under one supreme head, and a "Congress competent for the government of all those national affairs which do not nor cannot come within the jurisdiction of the separate States."

appointed by the several State legislatures, and under the resolution which called them together were to "report alterations and provisions" for reforming the Articles of Confederation. The Convention met in Philadelphia, May 14, but it was the 25th of May before the formal organization, by the election of Washington as presiding officer, had taken place. Upon consideration the Convention decided that the Articles were too faulty to be amended; but as specially assembled delegates from the various States they assumed authority to frame an entirely new plan of federal Union, and to recommend the same to the several States for adoption. Strictly considered it was a revolutionary proceeding; the delegates had exceeded their authority, and the plan of government proposed by them provided that "The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same," a provision contrary to the stated method of altering the Articles of Confederation.—Cooley, "Principles," 15; Von Holst, Const. Law, 17. Regardless of the existing law the Convention did its duty, and adopted a plan of union which, avoiding the errors of the past, sought also to meet the exigencies of their then situation. It is the work of this Convention which we are to study as the fundamental law of our political organization.

Sec. 74. THE CONSTITUTION RATIFIED BY THE PEOPLE OF THE STATES.—The work of the Constitutional Convention was completed

September 17th, 1787. The Constitution was submitted to Congress and by it given to the several States for ratification. It was ratified, as recommended, by conventions of delegates chosen by the people in each State. Within a year eleven of the States had so ratified the Constitution, and in September, 1788, Congress made provision for an election and fixed the date of the inauguration of the new government for the 4th of March, 1789, though it was not until the 30th of April, 1789, that President Washington was inaugurated. North Carolina did not ratify the Constitution until November, 1789, and Rhode Island not until May, 1790.

Sec. 75. AMENDMENTS.—The Constitution provides the method by which it may be amended. Strong opposition was made by several States to ratifying the Constitution because it contained no bill of rights, or statement of individual immunities from governmental oppression. It was ratified with the expectation that these would be added by amendments. The first ten articles or amendments contain this bill of rights, and were proposed by the first Congress and ratified by eleven States before the close of the year 1791. The eleventh article limits the judicial power, the twelfth changed the method of electing the President and Vice President, while the last three amendments were made necessary by the civil war. It is to be observed that the restrictions imposed by the Constitution and the amendments thereto, apply only to the government of the Union, and not to the State govern-

ments unless they are expressly mentioned.—Cooley, "Principles," 18.*

*Among the many valuable authorities on the formation of the Constitution and its interpretation are the writings of Hamilton, Madison and Jay in the "Federalist," and Elliot's five volumes, entitled "Debates in the State Conventions."

CHAPTER II.

DEFINITIONS AND FUNDAMENTAL PRINCIPLES.

Sec. 76. **SOVEREIGNTY.**—Sovereignty is defined as the supreme, absolute and uncontrollable power by which a State or nation is governed. It is the absolute right to govern and is always the final and only source of governmental authority. The sovereignty is the same whether embodied in a republican or monarchical form of government, since it is the power and not the persons who possess it or those who exercise it. Under a republican form of government the will of the people is recognized as the sovereignty or supreme power. Every State possesses sovereignty, and, possessing it, a State is, in the largest sense, independent of all other States, as this power is inconsistent with dependence.* Sovereignty is single and indivisible, as it could not be supreme and uncontrollable if capable of being divided and one portion pitted against another. But while sovereignty is indivisible it is claimed that the powers of sovereignty may be classified and some of them apportioned to the government of the United

*The word "State" as above used is synonymous with nation, and means an independent and sovereign political entity. It will also be used as designating a member of the Federal Union.

States to be exercised, while others are left with the States.**—Cooley, Principles, 3d ed., p. 21.

We have seen (Vol. 1, How to Study Law) that all positive laws, or laws set by man over man, emanate from the sovereign power. Under our system the State, by virtue of its sovereignty—the will of the people—is the source of all laws. Hence the establishment of a Constitution or fundamental law is an act of sovereignty.

Sec. 77. THE RESIDENCE OF SOVEREIGNTY.—The right of the people to establish their government and lay down the fundamental law was expressly asserted in the Declaration of Independence and upheld by the power of war, and it is, therefore, the leading principle of our constitutional liberty that sovereignty resides in the people.—Cooley, Principles, p. 28. Having established their independence the people of the several States formed governments based upon written constitutions for the better exercise of their sovereign powers. By these constitutions republican governments were established with departments for the exercise of sovereign powers in the manner prescribed by the

**The text gives the prevailing theory in regard to the anomalous fact that sovereign powers are wielded by both the State and National government. The States' Rights school, under the lead of Calhoun, asserted that sovereignty as well as sovereign powers are indivisible, and denied that the Constitution or any real law could be the result of contract, claiming that thirteen sovereignties could not create another sovereignty. Calhoun, Works, I., 156, et seq.

people. The will of the people was stated to be the supreme authority, and the constitutions were subject to alteration or amendment by the people as well as subject to their fundamental and absolute right of revolution. When the Federal government was established the sovereign people apportioned between the United States and the States the exercise of sovereign powers. The United States was given the supreme and uncontrollable power in respect to certain subjects with jurisdiction throughout all the States, while the States were to retain the like unqualified power within their respective limits in respect to other subjects. The grant of powers by the people did not exhaust the power which they possessed. In some cases the States have a qualified and defeasible power to exercise for a time the control of subjects granted to the United States.—*License Cases*, 5 How. 504-588; *Smith v. Alabama*, 124 U. S. 465; *Cooley*, *Principles*, 21-22; see post, secs, 182, 148.

Sec. 78. ASSOCIATION OF STATES.—The essential element of a State or nation is the possession of sovereign power; the sovereignty is the State's highest attribute. This sovereignty is in its very nature single and indivisible, hence a State is separate from every other, and its sovereignty ends at territorial lines. But sovereign States may make compacts with one another, and these compacts may result in a treaty, an alliance, a league, or a confederation.

Sec. 79. SAME SUBJECT—A CONFEDERATION.—A Confederation is the highest step in the association of sovereign States, and the last step which

may be taken without the formation of a single Federal State. It differs from a treaty or alliance in that it has governmental organization. A Confederation results from an agreement to place certain governmental powers in the control of a central organization, with a further agreement on the part of the States to obey the regulations of the central body in those matters. The sovereignty and independence of the confederated States is admitted, and its results is not to make one great State but to allow two or more States to operate in conjunction. The Germans express the idea of a Confederation by the word "Staatenbund" (States in band).—Calhoun, Works, I., 156.

Sec. 80. A FEDERAL STATE.—A Federal State is one supreme State which is composed of a number of subordinate members, which may or may not have been sovereign States at some previous time. A Federal State is most frequently a development of a Confederation; this is so in the case of the United States, Germany and Switzerland. In a Federal State the allied States form a Union, which is the single collective government, but this union does not destroy their separate organization, or deprive them of sovereign power in administering local concerns.—Black, Const. Law, 27. The central power is made a true State, with sovereign powers, external and internal, in national affairs; and its authority is directed to the individual citizens of all the States, as well as to the States themselves. In a Confederation there are a number of sovereign States, in a Federal State there is only one sovereign State; it

is, as the German word expresses it, a *Bundesstaat* (banded State).

Sec. 81. THE UNITED STATES A FEDERAL STATE.—The Constitution fused the people of the several States into one people of the larger United States. The Constitution was agreed upon by delegates representing the States, was then submitted to the people of the several States and by them adopted through delegates elected for the express purpose of passing upon it. Thus the Confederation was replaced by a national government which the people of all the States had formed, and the citizens of each State became also citizens of the United States.—*Cohens v. Virginia*, 6 Wheat. 264; *Minor v. Happersett*, 21 Wall. 162. “The people of the United States and the population of the States are the same individuals. Federal government and State governments are their creatures, and have the same object—the welfare of the people.”—*Von Holst, Const. Law*, 58. The Federal government became the agent of the people rather than of the States. It is their exclusive agency in all their affairs as a nation, and has paramount authority within the sphere allotted to it. The Constitution thus makes the Union a legal Federal State.—*Martin v. Hunter*, 1. Wheat. 304-324.

Sec. 82. A FEDERAL GOVERNMENT.—Alexander Hamilton defined a Federal government as “one in which the federal authority is independent of any of its component parts within the sphere of the federal action.” He distinguished it from a Confeder-

ate government "in which the States alone are sovereign, and which possesses no inherent power."—Federalist, No. 86. A Federal government may also be distinguished from a purely National government in which the central authority is not limited to a definite sphere.*

Sec. 88. **THE UNITED STATES A FEDERAL GOVERNMENT.**—By the Constitution the United States is given certain powers, and within the scope of this grant it is sovereign and supreme. Whatever is not conferred is withheld, and belongs to the several States or to the people thereof.—*Calder v. Bull*, 3 Dall. 386. The States are also supreme within their sphere, and the Constitution provides for their perpetuation and integrity. In *Texas v. White*, 7 Wall. 725 -6, it is held that as the Articles of Confederation declared the Union to be perpetual, and the Preamble to the Constitution declared that its purpose was to "form a more perfect Union," it is therefore indissoluble, and when a State is once in the Union, there is "no place for reconsideration or revocation, except through revolution, or through the consent of the States." In the same decision the court held that "the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Without the States in Union there could be no such political body as the United States. Not only, therefore, can

*The so-called Federalist party, led by Hamilton, advocated nationalism, while the anti-Federalist party favored a true Federal government. See Schouler, *Hist. U. S.*, I., 54.

there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may not unreasonably be said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution in all its provisions looks to an indestructible Union composed of indestructible States." Thus the United States has in the most perfect sense a Federal government.

Sec. 84. CONSTITUTION DEFINED AND EXPLAINED.—A Constitution is the fundamental law of the State, and embraces the principles upon which the government is founded, and regulates the division of the sovereign powers.*

Every State has a Constitution upon which its government is founded. From the earliest times men have sought to construct these fundamental laws, which direct what persons or body of persons shall possess each class of sovereign powers, and determine to what department each class of powers shall be confined and the manner in which such powers shall be exercised. Many theories have been advanced as to the best constitutional make-up of the government. The Constitution of the United States is a combination of the principles found in the Constitutions of England and

*The term constitution may be defined as the body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised. Cooley, Principles, 3d ed. 22.

the American Colonies, with additions and compromises to meet the political condition of the combined States.

Sec. 85. WRITTEN AND UNWRITTEN CONSTITUTIONS.—Constitutions are, 1, written; or, 2, unwritten.

1. **Written Constitutions.** A written Constitution is one whose provisions are written in an instrument evidencing the actual frame of government.

2. **Unwritten Constitutions.** An unwritten Constitution is one built up by usages, decisions of the highest courts, and laws and precedents established in critical periods. The English Constitution, which is unwritten, in this sense, is embraced in the common law, statutes, maxims, royal charters, declarations of rights and decisions of the courts. Unwritten Constitutions include many principles which are mere understandings, as the maxim in the English Constitution that the king can do no wrong, is construed to mean that the king cannot intend a wrong, and that his advisers who have encouraged him are responsible for the wrong. Some of these understandings have come to attach to our written Constitution. Thus the election of the President was intended to be indirectly by the electors, but by a long followed rule the electors vote as they are instructed by the party conventions. It is not a constitutional understanding, however, that the President shall not hold office for more than two terms. Our Constitution has been insensibly modified by the decisions of the Supreme Court, in the exercise of its

power to interpret the provisions of the Constitution and apply the law to the cases which come before it.

Sec. 86. WRITTEN CONSTITUTIONS IN THE UNITED STATES.—The Constitution of the United States and the Constitutions of the several States are written, and in theory can be changed only by written amendments made in the manner prescribed in the Constitutions themselves. Our written Constitutions are claimed to possess the advantages of certainty and definiteness, and to be less likely to be disregarded as the method of altering them makes them superior to the ordinary statute. The principles of an unwritten Constitution may be altered or overturned by the ordinary law. A written Constitution is less easily modified by the people, and is more rigid and inflexible than an unwritten one. This may or may not be an advantage. If the character of the legislative body is such that the interests of the people are in jeopardy, it is an advantage; but where the legislature and the people are progressive a written Constitution may retard growth. (See Sec. 81, How to Study Law.)

Sec. 87. CONSTITUTIONAL LAW DEFINED.—Constitutional law is that branch of jurisprudence which treats of the principles of government, and the practical exercise of the powers of government in conformity with those principles, as well as the construction to be given to the powers of government in their application to the interior relations of the people. As a strict science, American Constitutional law is the

study of written Constitutions and their construction and exposition. The principles of this science are to be found in the decisions of our Supreme Courts and in the works of authoritative commentators. Constitutional law is sometimes called political law.

Sec. 88. DUAL CONSTITUTIONS.—Under our Federal system of government we have dual Constitutions—the Federal Constitution, which is the supreme law of the Union; and the State Constitutions, as the supreme law of the several States. The Federal government is a grant of powers from the people, and covers only a portion of the powers of sovereignty; all other powers remain in the States or the people. The States having existed before the National government, and having been sovereign until the formation of the Federal government, are construed to retain all powers not granted by the people to the Federal government at the time of the ratification of the Constitution, or by subsequent amendments. The legislatures of the States are thus limited only by the Constitution of the United States, and the Constitution of their own State. The Federal Constitution is expressly declared to be the supreme law of the land, and any State Constitution or law violating any of its provisions, or contrary to any law under its authority, is unconstitutional and void—*Calder v. Bull*, 3 Dall. 386; *United States v. Cruikshanks*, 92 U. S. 542; *Const. U. S.*, Art. vi., Sec. 2; *Cooley, Principles*, 3d ed., 81-83.

Sec. 89. CONSTRUCTION OF WRITTEN CONSTITUTIONS.—All written Constitutions are constructed upon a general uniform plan. They declare: 1. The rights of the people to liberty, property, etc., by a bill of rights. 2. The frame of the government. These two things are the essential and important provisions in all Constitutions.

Sec. 90. SAME SUBJECT — BILL OF RIGHTS.—A Bill of Rights is the declaration of the fundamental principles of liberty and property which are to govern the people until changed. It was urged in the *Federalist* that these would be embodied in our Federal Constitution without being expressly stated. They were left out of the original Constitution and subsequently added by amendments to allay the fears of the people.*

*The principles usually declared in a Bill of Rights in America are those which have been formulated in England from the time of the first great charter granting or recognizing the rights of the people in 1215. This charter known as "*Magna Charta*," declared among other things that "No freeman shall be taken or imprisoned or disseized or outlawed or banished or anyways destroyed, nor will the King pass upon him or commit him to prison, unless by the judgment of his peers or the law of the land," and was so distasteful to the Crown that it had to be coercively confirmed more than thirty times between the reigns of Edward I. and Henry IV. In 1628 came "*The Petition of Rights*," a Parliamentary declaration of the rights of the people assented to by Charles I., and for a violation of which he lost his head. After the Revolution and the Commonwealth, Charles II. assented to "*The Habeas Corpus Act*" to regain the throne. Another revolution was necessary to gain the "*Bill of Rights*"

Sec. 91. SAME SUBJECT—THE FRAME OF GOVERNMENT.—The frame of government in a Constitution signifies the distribution of political power, or the pointing out of the avenues through which the sovereignty of the State is to be exercised. Thus our Federal Constitution, as well as the several State Constitutions, establish republican governments as distinguished from monarchical and aristocratical governments. Further, our Constitutions divide the political power into three branches,—the executive, legislative and judicial,—each branch being in the main independent and exclusive in its general field.

The idea of this tripartite division of governmental powers was suggested by Aristotle in his "Politics," book 6, ch. 11, and developed by Montesquieu, a

of 1688, when William and Mary ascended the throne. These rights were again asserted in the "Act of Settlement" in 1701. We have as yet had no similar contention to have them inserted in our Constitutions, and it is something of an anomaly to have them at all in a government said to be of the people, by the people and for the people.

In substance these rights are: 1. The right of personal security, or the right to be free from the intrusion upon one's liberty by the government, save as a punishment for crime. 2. The right of personal liberty, or the right to go where one pleases and do what one pleases, without restraint, except by due process of law. 3. The right of private property, which consists in the free use of one's property without control or diminution, except by the law of the land. 4. The right of justice, which included the right of trial by jury and the other securities to which every man charged with crime is entitled. 5. Right to petition for redress. 6. Right to bear arms.

French writer of the first half of the eighteenth century. (*Esprit des Lois*, liv. 11, ch. 6.) This plan had found favor and was in practice in some of the Colonies prior to the formation of the Union, but without the Constitutional provision separating the powers of government the legislature might have exercised all branches of governmental power.—*Ross v. Whitman*, 6 Cal. 361; *Calder v. Bull*, 2 Root (Conn.) 350.

The division of governmental powers into these three branches is a natural one under Constitutional principles. In the process of government, laws are to be made, executed and interpreted. This power to make and prescribe, or to alter, amend or repeal laws, is the function of the legislative department. The power to enforce and carry out the law is the province of the executive department, while the application of the law to cases, and interpreting the true intent of the law-makers, is the function of the judicial department. In the practical exercise of its powers each department makes use of auxiliary powers necessary to its security and efficiency, and the Constitution recognizes that the separation of powers is not absolute in every particular.

CHAPTER III.

THE CONSTITUTION, PREAMBLE AND LEGISLATURE.

THE PREAMBLE.

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.*

Sec. 92. THE PREAMBLE CONSIDERED.

—The opening paragraph of the Federal Constitution, given above, is called the preamble. A preamble signifies the introductory part of a statute or resolution, and states or indicates the reason and intent of what follows. Though it is held that the preamble is not an independent source of power to the Federal authorities, yet it has a definite weight and is an essential part of the Constitution itself, being to it what the enacting clause is to an ordinary law. The preamble declares by whom the Constitution was adopted and for what purposes.

*That the student may have the clause of the Constitution before him which is being construed and discussed, we have chosen the plan of giving, in smaller type, the provisions of the Constitution, and immediately following the rulings and decisions which have been made in its application and interpretation. This plan affords a connected view of the instrument as a whole.

Sec. 98. SAME SUBJECT—"THE PEOPLE OF THE UNITED STATES."—It is declared in the preamble that "the people of the United States" adopted the Constitution. A dispute quickly arose over this phrase. The State's-rights party claimed that in fact and law there was no single entity known as "the people of the United States," and that the Constitution was a compact between the States. This party, under the leadership of John C. Calhoun, of South Carolina, contended that the States were sovereign under the Constitution as well as before, and that each State could decide for itself the constitutional authority of the central government, and, if necessary, declare the action of the government null and void. It was a logical deduction from this theory of Calhoun's that the sovereign States could withdraw from the compact whenever their sovereign will changed and the Federal government would have no power to coerce them. Secession, or the withdrawing from the Union, was claimed as an inherent right of the sovereign States, and one that could not be surrendered by the adoption of the Constitution.—Von Holst, *Const. Law*, 89-41. The civil war put an end to the claim of the States to sovereignty and the right to secede from the Union, and the question is now settled that the people of the United States gave the Constitution to the Union. The people rightly named themselves as the possessors of sovereignty, and justly undertook the establishment of a government by the Constitution.—*Martin v. Hunter, I. Wheat.* 304-324. The new government thus estab-

lished did not lose sight of the organizations through which the people had operated, and the Constitution recognizes the federal character of the nation which it established.—*Texas v. White*, 7 Wall. 725.*

Sec. 94. SAME SUBJECT—THE PURPOSE OF THE CONSTITUTION.—The preamble tersely and yet accurately states the purposes of the Constitution. In *Chisholm v. Georgia*, 2 Dall. 419, it was said that these purposes “comprise everything requisite, with the blessing of Divine Providence, to render a people prosperous and happy.”

ARTICLE I.

Section 1. Two Houses.

All legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Sec. 95. A BICAMERAL LEGISLATURE.—This section gives the legislative power of the United States to a Congress consisting of two houses or chambers whose concurrent action is necessary to valid legislation, and establishes the bicameral system of law-making. The Confederation had a single legislative body, or a unicameral system. The Greek and

*The language of the preamble excludes the idea that the Constitution was a compact between the States, and the resolution adopted by the Constitutional Convention “that a National government ought to be established, consisting of a supreme legislative, executive and judiciary,” shows clearly that the members of the Convention understood that the Confederation was to be replaced by a Federal State. *Madison Papers*, 746-761; *Federalist*, No. 9.

Roman legislatures were unicameral in form, and were free from the disputes and deadlocks so common to our equal and co-ordinate chambers, as well as capable of showing greater strength and unity of purpose. While unanimity has its value in some cases, the effectual check which the bicameral system offers to hasty and ill-considered legislation was deemed of immeasurably greater importance by the framers of the Constitution. The two-chamber system was in practice in a number of States, and the security against evil legislation afforded by the mutual check of the two bodies was deemed a valuable feature in the construction of the Federal government.*

*The idea of checking the legislative power to prevent it from becoming a menace to the people has not ended with the establishment of the bicameral system in America. Log-rolling schemes and wholesale bribery in both State and National legislatures have shown the necessity of further restrictions on the legislative power of the people's representatives (?). The States in their Constitutions lay down with great minuteness the scope of the legislative power in regard to those matters which are the most likely to be abused, and limit the legislature in various other ways. Further, there is a quite general demand that the people assume the power of checking and initiating laws by the system known as the referendum and initiative. By the referendum, laws distasteful to the people could be submitted to a vote and would stand or fall as a majority of the people decided. Through the initiative the people could frame a law by petition and vote on it by the referendum. Both the cantonal and federal governments in Switzerland have adopted the initiative and referendum. The state of South Dakota adopted a Constitutional amendment in 1898, by which the people may control the laws by the referendum and initiative.

Sec. 96. CONGRESS HAS ALL LEGISLATIVE POWER.—The two houses acting together constitute a “Congress of the United States,” and have all legislative power. The President, though given a qualified veto power on the action of Congress, is not thereby given a legislative function. He may delay but cannot forbid legislation. His failure to approve the laws passed by Congress imposes upon the two houses more stringent conditions, and in this way the veto power acts as a check upon the law-making power. —Von Holst, *Const. Law*, 112.

Section 2. House of Representatives.

Cl. 1. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

Sec. 97. REPRESENTATIVES CHOSEN DIRECTLY BY THE PEOPLE.—That the members of the most numerous legislative body in a republican government should be elected by the people directly ought to have been beyond contention. But there were men in the Convention who favored an indirect election by the State Legislatures. These persons argued that the people were generally ignorant and easily misled. They claimed that the chief evils in government arose from excessive democracy. On what facts they based these assertions does not appear. But the more democratic theory prevailed, and Representatives are elected directly by the voters. They hold office for two years,

and the entire body changes or is renewed at the end of this period. The wisdom of this provision is now unquestioned, and a quite general impression prevails that the Senators should be elected in the same way.

Sec. 98. WHO MAY VOTE FOR REPRESENTATIVES.—The fixing of the qualification of electors or voters is left primarily to the States to determine. But all whom they qualify to vote for the most numerous branch of the State legislature are ipse facto qualified to vote for Representatives. The States have variously determined the qualifications of electors, but as a rule all male citizens, twenty-one years of age, are so qualified if residents of the State and district for a prescribed time. The right to vote has been extended in some of the States to persons who are not as yet citizens of the United States, as aliens who have but declared their intention to become citizens, and have resided the prescribed time in the State. In a few of the States women are admitted to exercise the elective franchise equally with men.*

The fifteenth amendment precluded the States from denying the franchise to citizens on account of race, color, or previous condition of servitude. But other restrictions may be placed on the franchise, so that universal suffrage does not exist in the United States.—Von Holst, *Const. Law*, 72-3.

*In Colorado, Idaho, Utah and Wyoming women are allowed to vote at all elections, and in many other states women can vote for school officers.

Cl. 2. No person shall be a Representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of the State in which he shall be chosen.

Sec. 99. WHO MAY BE A REPRESENTATIVE.—The Constitution prescribes the qualifications of Representatives. They were easily decided upon by the Convention. That it might be a truly representative body the members are required to be inhabitants of the State in which they may be chosen. In England a member of Parliament need not be a resident of the place which he represents. A citizen whose official duties take him outside of the State is still considered an inhabitant and eligible to election. The third section of the fourteenth amendment disqualifies certain persons to hold office until Congress has removed the disability.

Cl. 3. Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative, and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Province Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five and Georgia three.

Sec. 100. APPORTIONING THE REPRESENTATIVES.—This clause of the Constitution embraces one of the great compromises made in the convention, and without which the various factions could never have united on the Federal Constitution. The number of Representatives being determined by population, the Southern States wished to have the slaves counted to swell their representation in Congress, the Northern States, having few slaves, desired to exclude them from the count. The provision in this clause was the compromise effected. “Three-fifths of all other persons” meant the slaves, but not, wishing to mention slaves in a Constitution based on a declaration of universal freedom, the framers used this circumlocution. The civil war put an end to slavery, and by the second section of the fourteenth amendment provision is made for the apportioning of Representatives under the new regime.—See post., Ch. ix.

Sec. 101. SAME SUBJECT — DIRECT TAXES.—The Northern States also demanded that if the slaves were to count for representation they should count in apportioning the direct taxes, hence the provision “Representative and direct taxes,” etc. The term “direct taxes” was not defined by the Convention, and just what taxes it was intended to cover is not known. The Supreme Court was early called upon to decide whether a tax on carriages by number was a direct tax, and held that it was not.—*Hylton v. United States*, 8 Dall. 171. The judges, three of whom had been members of the Constitutional Convention,

were of the opinion that "direct taxes" included only land and capitation taxes. The lead of this decision has been followed in a number of cases and in *Springer v. United States*, 102 U. S. 586, it was held that an income tax was not a direct tax. A late decision of the Supreme Court changes this well-established rule, and declares that an income tax is a direct tax within the meaning of this provision. This subject will be referred to again under the taxing power.—*Q. v. post.*, sec. 137.

Sec. 102. SAME SUBJECT—THE DECEN-NIAL CENSUS.—Every ten years a census or enumeration of the inhabitants is taken, and upon this basis the Representatives are apportioned. The Constitution does not fix the number of Representatives, but provides that they shall not exceed one for each 30,000 inhabitants, and that each State shall have at least one Representative. Under the provisional apportionment there were sixty-five members. In 1793, the basis of representation was raised to 33,000, and this number has been steadily increased each decade, until now (1890), the population necessary to representation is 173,901, and on this basis there are 357 Representatives.*

*The Census Bureau is under the Department of the Interior, and in addition to enumerating the inhabitants, takes advantage of the plan to gather valuable statistics along other lines.

The provision that each State must have at least one Representative has been of benefit to States with a light population in

Cl. 4. When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

Sec. 103. VACANCIES FILLED BY SPECIAL ELECTIONS.—In carrying out the plan of forming a popular branch of the National legislature it is provided that vacancies in the representation from any State shall be filled by special elections called by the executive of the State. This method of filling vacancies appealed to the convention as proper in keeping the legislative department independent of the executive, which would not be the case if the executive could fill vacancies by appointment. Representatives are in all cases to be chosen directly by the people. Vacancies may happen through the death, resignation or expulsion of a member, or from the acceptance of a Federal office which disqualifies a member.—Rev. Stat. U. S., Sec. 26.

Cl. 5. The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment.

Sec. 104. THE SPEAKER OF THE HOUSE.—The Constitution gives the House the power of organization and the right to elect its Speaker and other

a number of cases. In 1899, Delaware, Idaho, Montana, Nevada, Utah and Wyoming had each but one Representative.

The Territories each elect a delegate to the House of Representatives; these delegates may sit with the Representatives and debate, but cannot vote. Arizona, New Mexico and Oklahoma are the Territories which send delegates. Rev. Stat. U. S., Sec. 1862; World Almanac for 1899.

officers. The term "Speaker" was first applied to the presiding officer of the British House of Commons. In our country it is used to designate the presiding officer of the National House of Representatives and of the lower houses of the State legislatures. The Speaker of the House of Representatives (as also in the State legislatures) is a leader of the party having a majority of the members. His powers extend to the preservation of order and the regulation of debate under the rules of the House. He may vote on all questions and participate in general debate after calling another member to the chair. Having the right to appoint the standing committees which shape legislation, he is in a position to control the course of legislation to a large extent and is, therefore, the most important officer in our system of government.*—Cent. Dict. "Speaker;" Von Holst, Const. Law, 82; and Const. Hist. V., 203-219.

Sec. 105. IMPEACHMENT.—The House of Representatives has sole power of impeachment. Impeachment is a judicial proceeding or prosecution for maladministration or corrupt conduct in office. The power of the House only extends to preferring the articles of impeachment, that is, its power is to indict or prefer the charge, and the Senate, as we shall see in a later section, is given the power to try. This plan of making the National legislature a high court for cer-

*"Not only that the Standing Committees are the most essential machinery of our governmental system, but also that the Speaker of the House of Representatives is the most powerful functionary of that system." W. Wilson, Cong. Gov., p. 108.

tain political crimes was borrowed from the English system, where the high court of Parliament has similar powers; the House of Commons impeaching, and the House of Lords trying.—See Blackstone Com. iv., 259; 6 Am. Law Reg. N. S. 257 and 641.

Section 3. The Senate.

CL. 1. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof for six years, and each Senator shall have one vote.

Sec. 106. “TWO SENATORS FROM EACH STATE.”—The Constitution provides for two Senators from each State. This was the result of a compromise between the large and small States. The small States demanded equal representation in one of the houses, lest they be outvoted. The Senators in a sense represent the States, which in this branch of the legislature are equal. The Senate is called the upper house of the Federal legislature; its superiority is deemed to arise from the method of its organization. It consists of a smaller number of members, chosen for a longer term than the members of the House, and elected indirectly, that is, by the State legislatures.* In the Con-

*In some cases the people have gotten around this indirect election of Senators as provided by the Constitution by pledging their legislative candidates to vote for a certain person for Senator. The wisdom of the Constitutional provision has certainly been outgrown, if it ever had any. The people are deprived of their right to choose a fit person, and the Legislature, instead of using its combined intelligence to select a competent person, quite often sells the office outright to the highest bidder. As a

gress of the Confederation the States voted as units, that is, a majority of the members from the State cast the vote of the State, but in the Senate each Senator has one vote, and though the Senators from a State may be paired, or both on the minority side of a question, there is no ground of complaint on the part of the State.—Von Holst, *Const. Law*, 79.

CL. 2. Immediately after they shall be assembled, in consequence of the first election, they shall be divided, as equally as may be, into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen, by resignation or otherwise, during the recess of the Legislature of any State, the executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies.

Sec. 107. THE SENATE PARTLY RENEWED EVERY TWO YEARS.—While the House of Representatives changes each legislative period or “Congress,” the Senators hold for six years and are arranged into three classes, so that one-third of the members are renewed every two years. It has been arranged that both Senators from a State do not fall in the same class, and when new States are ad-

result of bribery our “upper house” threatens to become not only the “American House of Lords,” but also a “Boodlers’ Roost,” where only plutocrats and trust barons can hope to gain admission. Deadlocks frequently occur in the State Legislatures over the selection of a Senator by which the State is deprived of its representation for a considerable time.

mitted to the Union it is decided by lot which Senator shall hold for the long term and which for the short term. This arrangement makes the Senate a continuous body, always provided with experienced members. On the one hand it is not liable to be radically affected by any unusual political excitement, because only partly renewed each two years, and, on the other hand, this biennial infusion of new members keeps it from getting out of touch with the people, as would be the case if totally renewed every six years.

Sec. 108. VACANCIES IN THE SENATE.—Vacancies in the Senate are filled provisionally by the State executive. The importance of a State's representation is greater than in the House. Appointment is the speediest method of filling a vacancy, and was selected that the States might not be deprived of their representation. The appointment is effective only during the legislative recess, and must be ratified by the legislature when assembled, or a new Senator elected. The person elected to fill a vacancy holds only for the unexpired term and not for a full period of six years. If a vacancy occurs while the legislature is in session it elects a Senator at once. Rev. Stat. U. S., Sec. 17.

Cl. 3. No person shall be a Senator who shall not have attained to the age of thirty years and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

Sec. 109. QUALIFICATIONS OF SENATORS.—The Constitutional conditions for eligibility to a Senatorship are the same in kind as those for the lower

house; they are slightly higher in degree in pursuance of the plan of making the Senate a more select body. The requirement as to being an inhabitant was to insure the States local representation and enable them to protect their special interest in the National legislature. A number of States have seen fit to elect persons as Senators whose true residence and property interests were without the State.

Cl. 4. The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

Sec. 110. THE PRESIDENT OF THE SENATE.—Possibly to carry out the plan of making the Senate a higher and more select body than the House, it is provided that the second highest executive head shall be its regular presiding officer. To prevent him from becoming a legislative officer as well as an executive one, he is given a vote only in case of an equal division, and is divested of his office as President of the Senate when he exercises the duties of President of the United States.*

Cl. 5. The Senate shall choose their other officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the office of President of the United States.

*This provision is an anomalous one, and was doubtless suggested or borrowed from the English system, in which the King was supposed to sit as the head officer over the lords spiritual and temporal in one higher hall, while the commons sit by themselves in another. See Blackstone, Com. I., 153. The position comes quite convenient for the Vice President, who would otherwise be considerable of a figure head.

Sec. 111. ORGANIZATION.—The Senate has as full a control of its organization as the House, with the single exception of its presiding officer. It chooses its other officers and also a President pro tempore. An opportunity is usually given the Senate to choose a President pro tempore before the close of each session, that it may have a presiding officer in the absence of the Vice President, or in case of his being called to the Presidency.

Cl. 6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside, and no person shall be convicted without the concurrence of two-thirds of the members present.

Cl. 7. Judgment in case of impeachment shall not extend farther than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment and punishment according to law.

Sec. 112. POWER TO TRY IMPEACHMENTS.—As the upper house, the Senate is given sole power to try impeachments. This function being a judicial one, it is proper that the members should be on oath. When trying the President its character as a court is further augmented by requiring the Chief Justice of the Supreme Court to preside. The decision is final, and being of a political nature and extending only to removal from and disqualification to hold office, does not preclude punishment according to law for the

same offense. The rules of procedure are fixed by the same bodies given power to impeach and try.—Von Holst, Const. Law, 162-3.

Section 4. Concerning Both Houses.

Cl. 1. The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the place of choosing Senators.

Sec. 118. POWER OF CONGRESS OVER FEDERAL ELECTIONS.—The Constitution in this section authorized the States to make arrangements for the Federal elections, but provided that when Congress should subsequently act it would have power to fix the times and places and prescribe the manner of holding elections for the Federal legislature, except as to prescribing the place of choosing Senators. This exception was made necessary from the character of the Union as a Federal State. It would not be consistent with the independence of the States in local matters for the National Congress to determine the place of meeting for their legislatures. Until 1842 Congress did not exercise its power; then it provided that Representatives should be elected by districts.

In 1872 Congress provided that from and after 1876 members of the House should be elected every second year in fixed geographical districts of contiguous territory, the districts being equal to the number of Representatives to which the State was entitled. But when a State is entitled to more Representatives on the basis

of a new census, it may elect the new members from the State at large (Congressmen at large). It is provided by law that the elections for Representatives shall take place on the Tuesday next after the first Monday of November, and that all votes must be by written or printed ballots.—Rev. Stat. U. S., Secs. 28, 25, 27.

Congress has provided in regard to the election of Senators that the State Legislature which is chosen next preceding the expiration of the time for which any Senator was elected to represent such State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator. Failing to elect the first day, at least one vote is required to be taken every day during the session of the legislature, or until a Senator is chosen. An existing vacancy is filled in the same way, and a vacancy occurring during the session is filled by election on the second Tuesday after the legislature has organized and has notice of such vacancy.—Rev. Stat. U. S., Secs. 10, 15, 16, 17; Von Holst, Const. Law. 76-7.

Cl. 2. The Congress shall assemble at least once in every year, and such meetings shall be on the first Monday in December, unless they shall by law appoint a different day.

Sec. 114. WHEN AND HOW OFTEN CONGRESS MEETS.—In organizing the three departments of government the evident purpose of the framers of the Constitution was to make the departments as nearly as possible independent of one another. Hence the Constitution provided for the assembling of the legislative branch of the Federal government

without the intervention of the executive, except, as we shall see, in cases of emergency, when Congress may be called in extra session. By the Constitution Congress is required to meet at least once a year, and on the first Monday in December, unless by law a different day is selected. Except for a brief period after 1867, Congress has followed the Constitutional provision as to annual meetings on the first Monday in December.

Congress consists of the two Houses elected for different periods, but for convenience the legislative periods, or "Congresses," have been designated according to the term of the lower house. Each two years is a Congress, and consists of two regular sessions beginning on the first Monday in December of each year, called the first and second sessions, and such extra sessions as the President may have occasion to assemble. The first Congress was elected in 1789, so that the present Congress (February, 1899), is the 55th, and is in its second or last session. In December, 1899, the first session of the 56th Congress will assemble.*

*When Congress convenes, the President of the Senate administers the oath to its members, and takes charge of the organization.

In the House of Representatives, the clerk of the next preceding House makes a roll of the Representatives-elect, and places thereon the names of those persons, and those only, whose credentials show that they were regularly elected, in accordance with the laws of their States respectively, or the laws of the United States. In the absence or disability of the clerk, the sergeant-at-arms of the next preceding House performs this duty, and after him the duty may devolve upon the doorkeeper.

Section 5. Organization Rules.

Cl. 1. Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each House may provide.

Sec. 115. LEGISLATIVE AUTONOMY.— Each house is given power to pass upon the qualifications of its members. This power was necessary to their autonomous organization as independent departments in a Constitutional government.

The Constitution fixes the quorum at a majority of the members, and this means all the members elected. A quorum is an expression signifying the number necessary to transact business. In the English House of Commons forty members constitute a quorum. The Convention feared that if the quorum was fixed at less than a majority the number would be so small as to be a menace to those States distant from the seat of government and whose members would attend with more difficulty than those nearer the Capital. A less number than a majority may compel the attendance of absent members.

Cl. 2. Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

One of these officers of the preceding House acts as temporary presiding officer until the Speaker is chosen. Rev. Stat. U. S., Secs. 28, 31, 32, 33.

Sec. 116. RULES OF PROCEDURE.—Each house has established elaborate rules of procedure, and the House of Representatives has gone so far as to provide by rule that members present, but not voting, may be counted in determining the presence of a quorum, and the Supreme Court has upheld the rule.—United States v. Ballin, 144 U. S. 1.

Sec. 117. POWER TO PUNISH MEMBERS.—The Constitution gives each house the power to “punish members for disorderly behavior,” and it is contended that this wording gives only a disciplinary power to Congress as to acts committed during the session, and would not extend to acts committed elsewhere. But a broader view has prevailed, and in practice the power extends to acts committed when away from the house as a committeeman as well as for misconduct during the session. It is within the power of either house to say what conduct shall be deemed disorderly or dishonorable enough to require expulsion. The only appeal of the member is to the constituents, who may reelect him. Beyond the power to expel, the punishment which the houses may inflict is not stated, but custom has limited it to such punishments as are consistent with the dignity of a citizen.—Von Holst, Const. Law, 102.

Sec. 118. SAME SUBJECT—MAY PUNISH OTHERS THAN MEMBERS.—The power of the houses to punish extends to others than members, and results from the occasional judicial function of these legislative bodies. Thus the House of Representatives was held to have power to punish a contumacious wit-

ness summoned in reference to an impeachment or other matter over which the House has constitutional control. —*Kilbourn v. Thompson*, 103 U. S. 168. But the houses must not exceed their constitutional jurisdiction or punish for contempt alone. The House may punish a "breach of its privileges" by arrest, censure, and imprisonment, but not beyond the close of the session. See *In Re Chapman*, 166 U. S. 661; *Anderson v. Dunn*, 6 Wheat. 204; *Von Holst*, *Const. Law*, 108.

Cl. 8. Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House, on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

Sec. 119. JOURNAL OF PROCEEDINGS.—Several purposes are answered by the requirement that each house shall keep a journal of its proceedings. The plan effectually prevents the legislature from becoming a secret conclave, and prevents evil legislation by insuring prompt publication of the obnoxious law. These records have been kept and published.* The houses can say what is to be kept secret, but as it is clear that the Constitution intended publicity to be the rule and secrecy the exception, all meetings of the houses except executive sessions of the Senate are open to the public.

*These records are as follows: "The Debates and Proceedings in the Congress of the United States," which come down to 1837; the "Congressional Globe" begins in 1833 and extends to 1873, and the "Congressional Record" ever since 1873.

Sec. 120. FIXING THE RESPONSIBILITY.

—One-fifth of the members present can demand the “yeas and nays,” that is, a call of the roll of membership and a registering on the journal the vote of each member for or against the measure. This plan enables the minority to fix the responsibility for a measure, and make it known to the constituencies how their representative voted. When the members of the House were less numerous it did not take long to call the yeas and nays, but at present several hours are required, and this is a favorite method of the minority to filibuster and delay action of any sort.

CL. 4. Neither House during the session of Congress shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

Sec. 121. INTERDEPENDENCE OF THE HOUSES.—This clause gives each house a power over the action of the other as respects adjournments for more than three days, and the place of sitting. The mutual dependence was deemed a wise provision to prevent them from separating or adjourning and thus defeating all legislation.

Section 6. Privileges and Disabilities.

CL. 1. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to or returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

Sec. 122. SALARIES.—The Constitution provides for paying the Federal legislators. In England members of Parliament get no salaries, and poor members are supported by their constituencies. In the United States it has been the policy of the Federal and State governments to pay salaries to legislators. The salary of Senators and Representatives is \$7,500 per annum, with traveling expenses in going to and returning from each session. The Speaker of the House gets \$10,000.

Sec. 128. PRIVILEGED FROM ARREST.—While the members of the Federal legislature are under the disciplinary power of their respective houses they enjoy privilege from arrest in certain cases. This provision was to prevent the people from being deprived of their representative in Congress for slight causes, and also to keep the members independent and unbiased by protecting them from being interfered with while performing their duties as legislators. The expression, "breach of the peace," has been extended by judicial decision to include all indictable offenses, so that the protection from arrest extends only to civil causes.—Von Holst, Const. Law, 104.

Sec. 124. FREEDOM OF SPEECH AND DEBATE.—To make the legislators feel secure and independent in declaring their just convictions, they are not to be questioned in any other place for any speech or debate in either house. The framers of the Constitution were establishing a legislature which should be free from all outside influences, and the independence

of the members was secured as far as legal provisions could secure them. The exemption extends to votes cast, reports made, and to all official acts done by a member of either house. Whether members are liable for circulating their speeches out of either house is not definitely decided. The earlier decisions hold that the privilege is to be strictly construed and only to exempt such acts as are done in the fulfillment of official duties. In England the official publications directed to be made are protected from any suits for damages, and the better view in the United States is that a member will not be exposed to an action for libel or slander by sending to his constituents what he has said in Congress.—Von Holst, *Const. Law*, 105; Cooley, *Principles*, 51; *Coffin v. Coffin*, 4 Mass. 1.

Cl. 2. No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time, and no person holding any office under the United States shall be a member of either house during his continuance in office.

Sec. 125. APPOINTMENT TO OTHER OFFICES.—To prevent the political corruption which might result from the unlimited power of the legislators to create lucrative offices for themselves they are made ineligible during the term to hold an office created or the salary of which has been raised, during the time for which they were elected. It is further provided that a citizen may not hold an office under the United States and be a member of either house. Such an officer may be elected to either house, and his office

is thereupon deemed vacated. A member who accepts a Federal office forfeits his seat.

Section 7. Mode of Passing Laws.

CL. 1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills.

Sec. 126. REPRESENTATIVES MUST VOTE THE TAXES.—This clause crystallizes the principle which has been so stubbornly maintained by the English speaking people that the people or their representatives must vote the taxes which the people are to pay. The provision was incorporated from the English Constitution, where the House of Lords is not permitted to amend or originate any revenue measure, and can only pass or reject the work of the Commons. The Senate may concur or amend the revenue measures of the House, but in practice the House simply ignores the amendments of the Senate unless the Senate, by persisting in a refusal to pass any revenue measure, compels it to accept the amendments.—See Von Holst, *Const. Law*, 188.

CL. 2. Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States; if he approve, he shall sign it; but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and, if approved by two-thirds of that house, it shall become a law. But

in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Sec. 127. MODE OF PASSING BILLS.—The Constitution has left the forms to be observed in originating and passing bills to be determined by the rules adopted in each house. In general, all bills, save revenue bills, may originate in either house indifferently. Whenever a measure is introduced it is styled a "bill." Bills may be introduced by an individual member, on leave of the house, but are most frequently introduced by report from standing or special committees. In the House the standing committees, of which there are a great number, are appointed by the Speaker, while in the Senate they are elected by the majority. Bills are required to be read three times in each house, and on three different days, unless there is need of greater expediency, when the rules are suspended and bills passed forthwith. The first reading is for information, and if there are any objections the vote is taken on the rejection of the bill; if not opposed or rejected it passes as a matter of course to its second reading, and the question is then upon its commitment or engrossment. If committed, it is either to a standing committee, a select committee, few in number, or to a general committee of the whole house. Only bills of great importance are

considered in committee of the whole. After discussion in committee the bill is reported back to the house with or without amendment. If amendments are added in committee, these are acted upon by the house, and others may then be offered. When thus matured the question is upon its engrossment for a third reading; after this stage is reached amendments are rarely offered, though a rider or appended clause may be attached. The bill is now upon its final passage, and members array themselves for or against the measure. If it passes it is signed by the presiding officer and sent to the other house, where it goes through a similar procedure. If amendments are made in the other house it must go back to the house of its origin for concurrence. Having finally passed both houses it is enrolled and signed by the presiding officers of both houses, and ready to be sent to the President. See G. F. Hoar, "Conduct of Business in Congress," No. Am. Rev., Feb., 1879; Von Holst, Const. Law, 109.

Sec. 128. SIGNATURE OF THE PRESIDENT.—The Constitution provides that a bill having passed both houses in the regular way must be sent to the President for his approval. Thus the President is made to co-operate in legislation. As previously shown (ante, Sec. 96), he cannot absolutely prevent the bill from becoming a law. If he signs the bill it becomes a law at once; if he refuses to sign it, the bill may still pass by a two-thirds vote in each house. Both the President and the Congress are prevented from being imposed upon by the sharp methods of the other. If

the President neither signs nor returns a bill within ten days (Sundays excepted), it becomes a law; but if Congress adjourn within the ten days and thus prevent its return by the President the bill fails.

Sec. 129. THE SO-CALLED VETO POWER.

—The power given to the President by the Constitution to approve or refuse to approve legislation, is called the veto power. The word “veto” (I forbid) originated with the Roman Tribunes, who had the power to annul decrees of the Senate and civil magistrates. It now signifies the power of one branch of a government to forbid, oppose or delay the determinations of another branch. In England the Crown has the right to veto legislation, but it has not dared to exercise the right since the time of William III. (1692). The members of the Constitutional Convention were divided in regard to the veto power; some were in favor of an absolute veto or negative, that is, without the power in Congress to pass a bill over the veto. This would have given a despotic power to the President, and made it dangerous for him to exercise the power at all. A qualified or limited veto was therefore decided upon, and under it, as Hamilton observed, “A man who might be afraid to defeat a law by his single veto, might not scruple to return it for reconsideration; subject to be finally rejected, only in the event of more than one-third in each house concurring in the sufficiency of his objections.”—Federalist, No. 78. The limited veto is the wisest, as experience has shown. As exercised by the President it has proven a wise check on party legislation. The

President, being elected by the people directly, feels responsible to them, and in the past has proven always a capable and judicious man. Bills are seldom passed over his veto. The veto power also serves to maintain the balance of power between the departments; but to prevent the executive from becoming a legislator the power is restraining rather than active. It has been urged that the President be given the power to veto a bill in part instead of in toto, as he at present is required to do.—Von Holst, *Const. Law*, 118.

Cl. 3. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment), shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Sec. 130. EXTENT OF THE VETO.—The veto power was made to extend to every "order, resolution and vote," to prevent the legislature from evading the check provided, by passing important matters in the shape of resolutions, orders, etc. It is construed that two-thirds of the members present and voting will serve to pass the bill over the veto.

CHAPTER IV.

THE GRANT OF POWERS TO CONGRESS.

Sec. 181. IN GENERAL.—Though the Constitution grants the powers to be considered in this chapter to congress, they are in effect National powers to be exercised by the three departments of government. Many of the important functions of government begin with the enacting of laws, and the executive and judicial departments are thus given an enlarged sphere of action. Congress has power to make the laws, but the executive and judicial departments must execute and administer the laws when enacted. The Constitution does not define the powers granted to the government factors, it simply enumerates them. The governmental departments must themselves decide upon the boundaries of their powers. As we shall see later, the Federal Supreme Court is made the arbiter in determining whether or not the powers have been exceeded. And in these pages it is the decisions of this court in regard to the action of the other departments that will inform us what the Constitutional law of the United States really is. In construing the enumerated powers the court takes the view that as they are designed to accomplish a purpose, they must be considered together as a whole. Also that the enumerated and express powers carry with them implied or resulting powers sufficient to make workable and exploit them as granted.

That is, in the interpretation of the powers, that method shall be chosen which permits the fulfillment of the purpose of the Grant. *Gibbons v. Ogden*, 9 Wheat. 1; *Legal Tender Cases*, 12 Wall. 582.

Sec. 182. EXCLUSIVE AND CONCURRENT POWERS.—As a result of the Federal nature of the United States, powers not exclusively delegated to the United States may also be exercised by the State governments. Hamilton, in the *Federalist*, No. 82, thus specifies the exclusive powers of the United States: "Where the Constitution in express terms granted an exclusive authority to the Union; where it granted, in one instance, an authority to the Union, and in another prohibited the States from exercising like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally repugnant." In case the power is not exclusive in this sense the States may enact laws relating to the same subjects which have been granted to the Federal government. These are called concurrent powers. Usually the field is not occupied by the two authorities at the same time, but may be in some cases.—Cooley, *Principles*, 86. In most cases Congress has failed to act, and the States legislate until it does so, when their power is divested and their action is replaced by that of Congress. See *Sturges v. Crowninshield*, 4 Wheat. 122; *McCulloch v. Maryland*, 4 Wheat. 316.

Section 8. The Congress Shall Have Power.

Cl. 1. To lay and collect taxes, duties, imposts and excises, (;) to pay the debts and provide for the common defense and

general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.

Sec. 183. THE TAXING POWER.—One of the most important powers possessed by any government is that which secures to it an income adequate to meet its legitimate expenses. Under the Confederation the central government was dependent upon the States, as independent sovereignties for its revenues, and had no power to tax the people directly for its own support. This was one of the leading powers which the framers of the Constitution wished to confer on the new Union, but their character as judicious politicians kept them from going to the other extreme and giving the federal government carte blanche in the matter of taxation. The power to tax is inherent in sovereignty, and is unlimited; but the power when delegated may be limited as the sovereign people think best. The Convention had in mind the excesses committed by despotic governments possessing unlimited powers, hence they did not grant the power to tax without limitations. These limitations are in respect to the purposes for which taxes may be levied, and the manner of the levy.

Sec. 184. SAME SUBJECT—A DISPUTE AS TO PUNCTUATION.—The clause in the grant beginning “to pay the debts and provide for the common defense, etc.,” was early claimed to confer a distinct and substantive power to tax; the contention being that the whole paragraph conferring the taxing power should be read as though there was a semicolon after the word “excises,” and not a comma. Thomas Jefferson pointed

out that the true meaning of the entire clause was that "Congress shall have power to lay and collect taxes, etc., for the purpose of paying the debts, and providing for the common defense and general welfare." This is the construction which has come to prevail, so that Congress is limited in regard to the purposes for which taxes may be levied.—Cooley, Principles, 58; Pomeroy, Const. Law, Sec. 273; I. Story, Const., Secs. 907-921.

Sec. 185. SAME SUBJECT—LIMITATIONS AS TO THE PURPOSES OF THE TAX.—The clause is still unsatisfactory and the power indefinite. What are the debts that may be paid? How far does the power to provide for the common defense and general welfare extend? The factors of government must themselves decide these questions. Hence we must look to the action of Congress and the decisions of the Supreme Court to determine the construction of this power. Three general purposes are mentioned and these exclude all other purposes. So that every tax which is professedly laid for a private purpose is void as being unconstitutional.—Cooley, Prin. Tax, 58; *Loan Association v. Topeka*, 20 Wall. 655. But Congress has avoided the decisions of the courts by failing to state or specify the purposes to which the funds yielded by a proposed tax are to be applied. This is possible since the constitutionality of the tax laid, and the constitutionality of the use to which it is to be put have been made separate things. The courts recognize that in determining what answers the general welfare and constitutes a public purpose the legislature must primarily

decide, and they are slow to declare appropriations made by Congress unconstitutional. Generally the court will only arrest the proceedings and declare a levy void when the absence of public interest in the purpose for which funds are raised is so clear and palpable as to be perceptible at first blush.—*Broadhead v. Milwaukee*, 19 Wis. 624. The validity of the purpose of a tax has thus come to be largely a political one, and though the question of constitutionality has been debated in the legislature as to protective tariffs, levied as much to assist industries as for revenue, the courts have failed to declare such taxes bad. Congress having the power to levy any tax it deems necessary for the necessities of the government, the question of utility and equity of a particular tariff law is only incidental to the purpose of the exaction and will not be considered by the court.—*Veasie Bank v. Fenno*, 8 Wall. 533-48; *McCulloch v. Maryland*, 4 Wheat. 316; *Cooley*, Principles, 58.

Sec. 136. SAME SUBJECT—LIMITATIONS AS TO THE MANNER OF TAXING.—Congress is given power to lay and collect taxes, duties, imposts, and excises; “but all duties, imposts, and excises shall be uniform throughout the United States.” The word “taxes,” in its widest sense, includes duties, imposts, and excises, as it covers any exaction made by the government for its own support. Duties include impositions laid upon commodities in any situation, but the term is usually applied to the levies made by the government on the importation or exportation of com-

modities. Imposts are duties levied upon imported articles. Excises are taxes levied upon the manufacture, sale, or consumption of articles, and upon licenses to pursue certain trades, deal in certain commodities or exercise certain privileges.—Cooley, *Taxation*, 3. The rule requiring uniformity has been the occasion of considerable dispute, but has been construed to be complied with if the tax applies uniformly upon all in the same class or situation; and thus a tax would not be void as against this provision because not equally distributed throughout the United States.—*Head-Money Cases*, 112 U. S. 580. Neither is the rule respecting uniformity violated by exempting certain classes of property and persons from the operation of the tax on grounds of public policy, or by reason of other adequate consideration to the government from the parties exempted.—*Cooper v. Ash*, 76 Ill. 11; *Black*, *Const. Law*, 393-4.

Sec. 137. SAME SUBJECT—LIMITATIONS IN REGARD TO DIRECT TAXES.—As we have seen (ante, Sec. 101), Representatives and direct taxes are to be apportioned according to the population. The fourteenth amendment changes the method of apportioning Representatives, and omits the expression “and direct taxes” from the amended clause, which might put an end to this restriction if it were not prescribed in another part of the Constitution. Article I., Sec. ix., Cl. 4, provides: “No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be

taken." Hence Congress must apportion capitation and other direct taxes according to population.

A direct tax, as defined by Abbott's Law Dictionary, "is one that is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another, such as the excise or customs."

A capitation tax is one laid upon persons as individuals, irrespective of the amount of their property; it is a poll tax and also a direct tax.

In construing the meaning of the term "direct taxes" the court looked rather to the evident intent of the framers than to the political economists' definitions of direct taxes. As Judge Walker, in his American Law, page 128 (note), suggests, the rule in the Constitution as to direct taxes was a compromise in favor of the thinly peopled Southern States, whom it would have been unjust to tax as much per acre as more populous States. But this reason not applying to a tax on carriages or incomes, which are worth as much in the South as in the North, the court justly held that the provision only extended to land and capitation taxes. By a line of decisions rendered by the foremost judges and statesmen of the United States, this restriction has been construed not to extend to an income tax.*

*In *Hylton v. United States*, 3 Dall. 171, the judges held that a tax on carriages by number was not a direct tax within the meaning of the Constitution, and expressed the opinion that the

But the Supreme Court, in a recent decision declaring unconstitutional the Income Tax law of August, 1894, has overruled the former decisions and declared that an income tax is unconstitutional unless levied and apportioned according to population.—*Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 480; *idem.*, 158 U. S. 601. The decision was five to four, and the four dissenting judges wrote separate opinions opposing the decision of the majority.

As a result of this decision direct taxes now include land and capitation taxes, taxes on the income from real estate or personal property and on personal property.

Sec. 188. TAXATION OF GOVERNMENT AGENCIES.—The power of the United States to tax does not extend to the States or any of their gov-

provision only included land and capitation taxes. Mr. Justice Iredell holding that "As all direct taxes must be apportioned, it is evident that the Constitution contemplated none as direct but such as could be apportioned. If this cannot be apportioned, it is, therefore, not a direct tax in the sense of the Constitution."

Insurance Co. v. Soule, 7 Wall. 433, and *Veazie Bank v. Fenno*, 8 Wall. 533, hold that the income of an insurance company or bank may be taxed, and it will not be a direct tax. In *Scholey v. Rew*, 23 Wall. 331, an assessment on the devolution of an estate, or the right to become entitled to the same or the income thereof, is not a direct tax. In *Springer v. United States*, 102 U. S. 586, decided in 1881, the Supreme Court passed upon an Income Tax similar to the one recently declared unconstitutional, save that it possessed the added feature of being graduated, and declared the tax constitutional by a unanimous opinion. It being held to be an indirect tax and satisfying the Constitutional requirements if levied according to the rule of uniformity.

ernmental agencies. As before stated the Constitution contemplates the perpetual maintenance of the States as well as the Union. The power to tax involves the power to destroy, and this power could not consistently be conferred to authorize either the Union or the States to tax, and thereby control the constitutional measures of the other. Hence it is held that the United States cannot tax a State municipal corporation or its resources, nor the salary of a State officer, or the process of State courts, or a railroad owned by a State, etc.—*United States v. Railroad Co.*, 17 Wall. 322; *The Collector v. Day*, 11 Wall. 113; *Cooley*, Principles, 61-62. For the same reason a State cannot tax the governmental agencies of the United States. Thus a State cannot tax a bank established by the United States as its fiscal agent, or the bonds or other securities issued under the power to borrow money, or the salaries of Federal officers, or the franchise of a corporation created by the United States, unless permitted to do so by Congress.—*McCulloch v. Maryland*, 4 Wheat. 316; *Weston v. Charleston*, 2 Pet. 442; *Dobbins v. Commissioners*, 16 Pet. 435; *California v. Pacific R. Co.*, 127 U. S. 1.*

**McCulloch v. Maryland* is a leading case, and arose in 1790 from the attempt of the State of Maryland to tax a branch of the United States Bank which had been incorporated and had a branch at Baltimore. The State required all notes to be issued on stamped paper, and the cashier of the bank, refusing to comply with the law, was subjected to a penalty. In the Supreme Court it was held unanimously that the United States having a

Land belonging to the United States lying within a State cannot be taxed by the State; and though such land has been taken up by an individual, it may not be taxed by the State until the full legal right to a patent has been gained by such individual.—*Van Brocklin v. Tennessee*, 117 U. S. 151; *Wisconsin Central R. R. Co. v. Price Co.*, 133 U. S. 496.

The power to tax includes the right to make use of the customary means to enforce payment. Congress provides these means by law and they are to be followed in all essential particulars if the collection is to be valid.—*Cooley*, *Principles*, 64; *Springer v. United States*, 102 U. S. 586.

Cl. 2. To borrow money on the credit of the United States.

Sec. 189. THE POWER TO BORROW MONEY.—This power being granted in unqualified terms is construed to be given without restriction, and to be co-extensive with all the pecuniary demands upon the government. The public credit may be pledged for a present or future liability; obligations may be issued in any form, including government notes, or bills of credit, to be used as currency. Congress may provide a national currency for the whole country; it may issue its own notes and forbid all other currency; it may create national banks with power to issue notes authorized to circulate as money; it may make its own issues

right to establish a bank, the bank could establish agencies, and the State could not by the taxing power control or destroy such governmental agency.

(greenbacks) legal tender in time of war or peace. The United States has full power, the grant not being restricted as in the case of the taxing power. In *McCulloch v. Maryland*, 4 Wheat. 316, it was held that under this power Congress could incorporate a bank; it being incidental to the grant of power and necessary to make it effective, and being a governmental agency it could not be taxed by the States.—2 Story, Const., Sec. 1055.

Sec. 140. SAME SUBJECT—PAPER MONEY.

—The power of the United States to issue non-interest bearing notes, paper money, had been doubted by some and was not exercised until the exigencies of the civil war made extraordinary financial measures necessary. In 1861 Congress authorized the issue of \$50,000,000 in demand notes, as full legal tender in all cases, including customs and public dues. They were issued to pay government obligations and in exchange for coin. These notes exchanged at par value with gold and were never depreciated.—Waldron, *Hand Book on Currency and Wealth*, 1896.

In 1862, Congress authorized the issue of \$150,000,000 non-interest bearing notes of the United States, the same to be legal tender in payment of all debts, public and private, "except duties on imports and interest on the public debt."*

*The effect of this exception clause was to discredit the very notes or money which Congress was forcing the people to take. It was the workers, the soldiers and farmers who were injured by this action. They had to give their services and their products in exchange for this discredited money, but the bondholders who

The State courts having upheld the action of Congress, in 1869 the Federal Supreme Court was called upon to decide whether or not Congress could, under the power to borrow money, issue paper money and thus force a loan from the people. In *Hepburn v. Griswold*, 8 Wall. 608, the various acts issuing the notes were held unconstitutional in part; the court being divided five to three. Ch. J. Chase, who as Secretary of the Treasury had formed the plan for their issue, delivered the majority opinion, declaring that Congress could not make the paper money of the United States legal tender for debts contracted and existing previous to their issue, but that as to debts subsequently contracted they would be valid. This decision was contrary to the wishes of the dominant political party, and steps were at once taken to have it changed if possible. A vacancy having occurred in the court, and another judge added to their number by Congress, the President (Grant) was given to understand that the Senate would only confirm the two new judges if they were

had bought bonds with these same greenbacks must be paid their interest in gold, which being made superior, advanced in price as compared with the greenback currency. It is clear that a special privilege was granted to the bondholders, and by industriously farming this privilege during the years of the Nation's peril they were enabled to lay aside sufficient to establish themselves in various industries as a monopolistic and plutocratic class, ever ready to come to the assistance of the government when by so doing they can realize a handsome profit. See Corwin Phelps, "Ideal Republic," published by W. F. Reynolds, 267 South Lincoln street, Chicago.

in favor of the validity of the paper money issues. The judges were appointed, and in 1879 the court of nine judges in the *Legal Tender Cases*, 12 Wall. 457, reversed the previous decision and held the issues valid by a decision of five to four. Strong, J., delivered the majority opinion, but did not state the reasons for the finding. Bradley, J., based the action on the war power of Congress, and thus the opinion gained ground that paper money could only be issued in times of war. In 1884 the case of *Juilliard v. Greenman*, 110 U. S. 421, was decided, and holds that Congress may borrow money in this manner as well in times of peace as war, and the power extends to making the notes full legal tender for debts contracted before and after the issue. But individuals by contract may specify the currency in which payment shall be made (as gold, or coined money), and the courts will require the terms of the contract to be observed.—*Bronson v. Rhodes*, 7 Wall. 229; *Trebilcock v. Wilson*, 12 Wall. 687. So the States may decide for themselves in what kind of money their taxes shall be paid, irrespective of legal tender acts. See *Von Holst*, *Const. Law*, 62n.

Cl. 3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

Sec. 141. THE COMMERCE POWER.—One of the palpable weaknesses of the Confederation was the fact that the regulation of commerce was left to the individual States. The various regulations thus established arrayed the States against one another and prevented the carrying out of the commercial treaties with

foreign nations made by Congress. One of the leading purposes for which the framers of the Constitution assembled was to centralize the power over commerce. It was readily agreed that the power to regulate commerce should be given to Congress and denied to the States. But the power given is not plenary, and extends only to commerce with foreign nations, among the several States and with the Indian tribes. Hence Congress has no power to regulate domestic commerce within the several States.—*Veazie v. Moor*, 14 How. 568. By Art. I., Sec. ix., Cl. 5 and 6, it is provided that “no tax or duty shall be laid on articles exported from any State;” and that “no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.”

Sec. 142. SAME SUBJECT—ITS EXTENT.
—Commerce in its broadest sense includes every description of dealing between man and man. But the power to regulate commerce as bestowed on Congress excludes the purely internal commerce of the States. Commerce within the meaning of the grant to Congress includes intercourse between nations and between States for the purpose of trade in all its branches, covering the transportation, purchase, sale and exchange of commodities.—*Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1. Regulating commerce is the prescribing of the rules by which it is governed. Commerce extends to navigation, and the regulation of commerce includes

the control of waterways unless exclusively within a single State.—*Gibbons v. Ogden*, 9 Wheat. 1.

The commerce power is construed to be a progressive one and to expand as the agencies by which it is conducted develop. In *Pensacola Tel. Co. v. W. U. Tel. Co.*, supra, it is held that the powers over commerce “keep pace with the progress of the country, and adapt themselves to the new developments of times and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances.” Commerce being deemed an important subject of legislation, an intention to promote and facilitate it, and not to hamper or destroy, is naturally to be attributed to Congress.—*Texas & P. R. Co. v. Interstate Com. Com.*, 162 U. S. 197.

Sec. 143. SAME SUBJECT—WHEN EXCLUSIVE, WHEN CONCURRENT.—The power granted Congress over commerce does not necessarily exclude the States from all authority over the same subjects, provided they do not interfere with the actual legislation of Congress. But where the subject to be controlled is national in character, or of such a nature as to admit of uniformity of regulation, the power of Congress is exclusive, and the States may not regulate

the matter, even if Congress has not.—*Welton v. Missouri*, 91 U. S. 275. As to matters of local importance, though affecting more or less directly foreign and interstate commerce, State action is valid until Congress acts. Thus health or quarantine laws, pilots and the policing of harbors are subject to State regulations, unless they run counter to legislation that Congress has enacted.—*Cooley*, Principles, 70-1. So it is held that a State may require railroad engineers in the State, though engaged in interstate transportation, to be examined for color-blindness.—*Railroad v. N. Y.*, 165 U. S. 628.

Sec. 144. **COMMERCE WITH FOREIGN NATIONS.**—The propriety of committing all national matters to the general government is obvious, and the power is here exclusive of the States. The power is exercised by making commercial treaties, and by laws regulating the subject.—*Henderson v. Mayor*, 92 U. S. 259.

Commercial Treaties. From time immemorial nations have sought to gain reciprocal advantages in trade with one another. These take the form of commercial treaties; extending favors in return for favors shown us. These treaties as we shall see are made by the President by and with the advice of the Senate. They are carried into effect by the legislation of Congress.—*Walker*, Am. Law, 137.

Commercial Legislation. Congress has invariably by its legislation endeavored to encourage commercial enterprises and foster home production. Tariff laws

enacted under the taxing power have been avowedly to encourage domestic manufactures. Also by registration and navigation laws, requiring all vessels to be registered and only home-owned vessels to engage in the coast trade, it has given our ship-owners and builders the advantage over foreign competitors. The power extends to the creation of ports of entry and clearance, the making of rules as to the building and outfitting of vessels, providing for the safety of the crew and passengers, the legal rights and duties of sailors, etc. Ports are under the surveillance of custom house officers or collectors, who act under the direction of the Treasury Department. Sworn statements or manifests of the cargo must be furnished the collector of the port before a ship can enter or depart.

Embargo. The power of Congress over commerce has been held to extend to the total prohibition of foreign commerce, with certain nations as a retaliatory measure. This use of the power was upheld on the ground that the purpose was to protect commerce and not to destroy it.—*United States v. Brig William*, 2 Am. Law Jour. 255.

Sec. 145. COMMERCE BETWEEN THE SEVERAL STATES.—This power is barely stated, and we must look to the decisions for its construction. Commerce "Among States" must concern more than one State. It cannot extend to transactions wholly within a State, nor does it extend to agricultural products or manufactured articles in a State which may ultimately become the subjects of commerce among the

States.—*Veazie v. Moor*, 14 How. 568-574. Congress cannot legislate to control commerce on a stream whose navigable waters are exclusively within a State, but if it forms with its connecting waters a navigable highway, or though wholly within a State flows into a lake and thus forms a highway for interstate commerce, Congress may regulate it, and the regulation will extend to the boats which are used exclusively on the river.—*The Daniel Ball*, 10 Wall. 557. In interpreting the anti-trust law of 1890, the court held that while Congress would have the power to suppress monopolies where they operated to control interstate traffic, a mere combination to control the output of an article so indirectly affects commerce as not to be a subject of Federal legislation.—*United States v. E. C. Knight Co.*, 156 U. S. 1; *Cooley*, Principles, 68-9.

Sec. 146. SAME SUBJECT—THE LEADING CASES.—Among the first cases which raised the question as to what action of the States would interfere with the power of Congress is that of *Gibbons v. Ogden*, 9 Wheat. 1, a truly important and leading case.*

**Gibbons v. Ogden*.—This case arose on an injunction sued out by Gibbons in the State Court of New York to restrain Ogden from navigating the waters of New York Bay with steamboats. The State had given Livingstone and Fulton an exclusive grant to navigate the waters of the State by steam in consideration of their services in making the steamboat practicable. Gibbons was the successor of these rights and sought to restrain Ogden by reason of them. Ogden was engaged in the coasting trade with steamboats licensed and inspected according to the provisions of Congress. The State Court had upheld the grant,

The court held that commerce extended to navigation, whether by steam or sail, and that the action by Congress under its constitutional power over commerce precluded the States from any action which would interfere with or annul the acts of Congress.—Black, Const. Law, 189.

Another leading case in construing the commerce power is that of *Brown v. Maryland*, 12 Wheat. 419.*

but the Federal Supreme Court held the grant unconstitutional and void. The decision was stated by Ch. J. Marshall, and laid broad and firm the power of Congress to regulate or to keep free interstate traffic. It was held that Congress had the exclusive right to control commerce between the States; that the power applied to developed instrumentalities as well as to those in existence at the adoption of the Constitution. As the exclusive grant would interfere with vessels licensed under the laws of the United States for carrying on the coasting trade in the waters of New York, and would modify or derogate from the powers granted Congress, it was necessarily unconstitutional. The power was to be construed liberally, it extended to navigation, and being vested exclusively in Congress no part of it could be exercised by the States.

**Brown v. Maryland*—Brown, an importer of goods, was indicted and convicted under a State statute for not taking out a license and paying the license fee required of all importers by the bale. In the Supreme Court the statute was held void, as it was in effect a tax upon imports and would be in derogation of the commerce power. The tax on the business of an importer was in effect a tax on the goods and not on the man. Further, as Congress must have power to authorize the sale of imports when brought into a State, they cannot be taxed while in the hands of the importer and in the original package, as this would limit the power of Congress over commerce.

By this case it is held that a State cannot tax imports until mingled with the mass of property within the State. That the commerce power protects at least the first sale in the original package by the importer from being controlled by the State's power to tax.

Original Package Cases. Although the Supreme Court had held in the License Cases, 5 How. 504, 600, that where a State imposed a penalty upon the sale of liquors under certain conditions, the laws were valid though the liquor is imported from another State. The law being based for its validity upon the regulation of the health and morals of the people, and the article being considered injurious and not a legitimate article of commerce. Yet under the State (prohibition) regulations which forbade the sale of liquors within the borders of the State, the Supreme Court held that the right to bring a thing (liquor) into a State under the commerce power included the further right to sell it by the consignee while in the original package.—*Bowman v. Chicago, etc., Ry. Co.*, 125 U. S. 465; *Leisy v. Hardin*, 185 U. S. 100. These decisions aroused considerable debate throughout the country. The preservation of local option to the States necessitated a law to cover the matter. Congress therefore provided that all liquors transported into any State or remaining therein for use should, upon arrival in the State, be subject to its laws as though produced there, and should not be exempt, though introduced in the original package.—26 Stat. at Large 818; *In re Rahrer, Petitioner*, 140 U. S. 545.

In *Robbins v. Taxing District*, 120 U. S. 489, a li-

cense tax levied by the city of Memphis on all persons selling goods by sample was held void as to non-residents selling goods by sample to be shipped from another State. The court holding that when goods have become a part of the general mass of property in the State they can be taxed, but a State may not tax the first sale or offer of sale of goods sent from another State.

Sec. 147. THE POWER OF THE STATES OVER COMMERCE.—Such local matters as fall best to the regulation of the various States, and are in no sense national, may, in the absence of the action of Congress, be controlled by the States—*Cooley v. Wardens*, 12 How. 299. But the chief control exercised by the States over this matter arises indirectly from their police power. In the exercise of its power to protect the lives, health and property of its citizens, and to preserve good order and public morals, the State may pass laws and make regulations which, though they effect foreign and interstate commerce, will be upheld by the Federal courts if they are reasonable and do not impose needlessly burdensome conditions and restrictions.—*Railroad Co. v. Husen*, 95 U. S. 465; *Chi Ling v. Freeman*, 92 U. S. 275.

The following have been held as valid regulations on the part of a State:

A tax on commissions of brokers received during the year, though the business of the particular broker contesting was chiefly or wholly with a non-resident firm, and the goods made in another State.—*Ficklen*

v. *Shelby Taxing Dist.*, 145 U. S. 1. (Compare with *Robbins v. Taxing Dist.*, *supra.*)

A law granting to a State corporation the exclusive right to slaughter cattle in and near one of its large cities, and requiring that all animals intended for sale or slaughter be brought to the yards or slaughter houses of such corporation, and permitting the corporation to exact a prescribed fee for such services.—*Slaughter House Cases*, 16 Wall. 36.

A law requiring the taking out of a license as a condition precedent to dealing in intoxicating liquors, whether of home or foreign manufacture.—*License Cases*, 5 How. 504.

Requiring all railroad companies to advertise annually a schedule of tariffs or fares, and adhere to them during the year.—*Railroad Co. v. Fuller*, 17 Wall. 560.

An act forbidding the sale of oleomargarine “colored in imitation of butter,” though imported from another State and offered for sale in the original package.—*Plumley v. Massachusetts*, 155 U. S. 461. But the prohibition of the sale of oleomargarine in its pure and unadulterated state, imported and sold in the original package, was held invalid in *Schollenberger v. Pennsylvania*, 171 U. S. 1. Oleomargarine, when sold as such, and not prepared to deceive purchasers, is a legitimate article of commerce.

The police power of the State has been held not to extend to regulate:

Rates charged for interstate commerce, or the mode of doing business.—*State Freight Tax*, 15 Wall. 232.

A State cannot tax the gross receipts from the business of transportation between it and foreign countries or other States.—*Philadelphia S. S. Co. v. Pennsylvania*, 122 U. S. 326.

A statute of Missouri prohibiting the driving of Texan, Mexican or Indian cattle into it during certain seasons of the year, was held invalid under the police power, as it extended to wholesome as well as infected cattle, and was unreasonable.—*Railroad Co. v. Husen*, 95 U. S. 465. So the requirement that all cattle be inspected before slaughtering is unreasonable, as it prevents the importation of dressed meat from other States.—*Minnesota v. Barber*, 136 U. S. 318.

The State dispensary law of South Carolina was held to be invalid in as far as it prevented individuals bringing from other States liquor for their own use.—*Scott v. Donald*, 165 U. S. 58; *Rhodes v. Iowa*, 170 U. S. 412.

A statute of Illinois forbidding a greater charge for a short than a long haul by rail in the same direction, could not be applied to freight taken up within the State to be transported out of the State.—*Wabash Ry. Co. v. Illinois*, 118 U. S. 557.

A State may not regulate immigration by levying taxes upon the masters or owners of vessels bringing foreigners into their ports. But the United States may do so.—*Henderson v. Mayor of N. Y.*, 92 U. S. 259; *Head Money Cases*, 112 U. S. 580.

Where the right to regulate falls within the exclusive power of Congress, and Congress has not acted it is

equivalent to a declaration that such commerce shall remain free and untrammelled.—*Brown v. Houston*, 114 U. S. 622; *Welton v. Missouri*, 91 U. S. 275.

Sec. 148. SAME SUBJECT—MISCELLANEOUS CASES.—No State has a right to lay a tax on interstate commerce in any form, whether upon the article, upon the receipts derived from the transportation, or on the business of the carrier. But logs lying in a State waiting transportation may be taxed by a State unless transportation has actually begun. A railroad running between two points in the same State, though by a loop running into another State, may be taxed on its gross receipts, as this is domestic commerce. But an ocean voyage between two points in the same state is not domestic commerce, as it is conducted on the high seas.—*Lehigh V. Ry. Co. v. Pennsylvania*, 145 U. S. 192.

Though a privilege tax on sleeping cars may not be levied by the State on cars running between States, yet it may tax the capital stock of railways in the State and levy the same by the rate which the number of miles operated in the State bears to the whole number operated; and it may take the daily average of cars within the State as the capital stock of a company, though the cars are owned by foreign corporations engaged in interstate commerce, the cars being considered to have a status in the State.—*Pullman Car Co. v. Pennsylvania*, 141 U. S. 18. In *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, an excise tax measured by gross earnings levied by the State upon a foreign corporation engaged

in interstate commerce was sustained, though this decision conflicts with a previous decision holding a tax on gross receipts invalid.—185 U. S. 166.

A State may not interfere with the freedom of commerce by telegraph, either under its police or taxing power, so a tax on messages going within and out of the State is invalid.—*Tel. C. v. Texas*, 105 U. S. 460. But a State may tax the poles and other fixed property of the company having a situs in the State.—*Mass. v. W. U. Tel. Co.*, 141 U. S. 40.

It has been customary to let the States control and manage bridges, dams and ferries, since they are chiefly of local importance and are better directed by local authority than by national; but Congress may interfere when desired and supersede all authority of the States if the commerce power demands it.—*Monongahela Nav. Co. v. United States*, 148 U. S. 812; *Gilman v. Philadelphia*, 3 Wall. 718; *Lake Shore Ry. Co. v. Ohio*, 165 U. S. 365.

The power of Congress over commerce extends to punishing offences committed against commerce or which would defeat or obstruct it. As to punish larceny from a ship; to remove and prevent obstructions to commerce or the mails on highways natural or artificial. It may also appeal to the civil courts to determine the character of the obstructions to its powers and invoke the various remedies of such court to remove them, including an injunction. *In re Debs*, 158 U. S. 564.*

*It may be interesting to note how easily courts can find the

Sec. 149. INTERSTATE COMMERCE ACT.
—Congress under its commerce power in 1887 passed the “Interstate Commerce Act.” 24 Stat. 379. This Act provides for the establishment of a commission of five members to hear and determine complaints regarding, and to enforce the provisions of the Act. The Commerce Commission is given power to prevent unjust discriminations, whether by rebate, special rate, drawback, or other device; to prevent undue preferences being given to a person, corporation or locality, or to a particular kind of traffic; to prohibit a greater charge being made for a “short haul” than for a “long haul,” to prevent pooling of freight or earnings, and combinations among carriers to prevent the continuous transportation of goods. The Act applies to all common carriers, by rail or water, transporting persons or property beyond the State. The carriers subject to the Act are required to make annual reports of their business to the Commission, and persons injured by violation of its provisions by carriers are given a right of action for damages.

Sec. 150. COMMERCE WITH THE INDIAN TRIBES.—The power of Congress over commerce with the Indians is plenary. It may pass laws regulating or forbidding it. The power is not limited to

power to check individuals who attempt to force their rights from the corporations for which they are laboring, but how difficult it is for them to extend the same power to check the lawless obstructions to commerce on the part of monopolies and trusts. See Sec. 145 ante.

State lines, but extends wherever the Indians are found, whether in the reservations, the Territories or the States.

—U. S. v. Barnhart, 22 Fed. 285.

The power extends to regulate commerce between the different Indian tribes, and even to the case of an individual Indian who sells liquor to another Indian.—United States v. Shaw-Mux, 2 Sawy. 364.

Cl. 4. To establish a uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States.

Sec. 151. NATURALIZATION.—The exclusive power over naturalization is vested in Congress by the word “uniform.” Naturalization is defined to be the admission of persons not native to a country to its various political privileges. The States may confer the right to vote—so-called State citizenship—upon persons who are not citizens of the United States. But the power to make an alien, one born subject to another country, a United States citizen, is exclusively the power of Congress.—Chirac v. Chirac, 2 Wheat. 259.

Sec. 152. NATURALIZATION LAWS.—By Sections 2165 to 2174 Rev. Stat. of the United States a general law lays down the conditions under which aliens, “being free white persons, and aliens of African nativity and persons of African descent,” may become citizens of the United States.* A native of China, of

*The requirements of the naturalization laws are: A continuous residence by the alien within the United States for five years; a declaration on oath at least two years before applying for final papers, and before a court of record, that it is his

Mongolian race, may not be naturalized under this law.—In *re Ah Yup*, 5 Sawy. 155. When the Territories are admitted as States in the Union, persons resident therein and not citizens of the United States may be admitted to citizenship. The inhabitants of Florida became citizens of the United States on its cession by Spain to the United States.—*Boyd v. Nebraska*, 148 U. S. 135; Opinions of the Justices, 68 Me. 589.

Sec. 153. **BANKRUPTCY.**—The Congress of the United States has full power over bankruptcies if it chooses to use it; but when it has not regulated the subject the States may do so, and their action is valid until replaced by the action of Congress.—*Sturges v. Crowningshield*, 4 Wheat. 122. Congress has passed four different acts in the exercise of this power, the first three

bona fide intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign State, and particularly to the one of which he is at the time a citizen; at the time of his application for final papers before a court of record he must show that the previous conditions have been complied with, that he has behaved as a man of good moral character, and resided at least one year in the State in which such court is held, and declare on oath that he will support the Constitution of the United States, and renounce allegiance to every foreign State. Any hereditary title of the alien must be renounced. If the alien has served in and been honorably discharged from the armies of the United States, he may become a citizen on his petition after a year's residence. Children of naturalized persons, who are under the age of twenty-one when their parents are naturalized, shall be considered citizens of the United States if dwelling therein. Naturalization confers upon the alien all the rights, privileges and immunities belonging to the natural born citizen.

have been repealed, and the last is now in force.* The federal power over bankruptcies extends to all classes of persons and to voluntary as well as involuntary bankruptcy.—In re California Pac. R. R. Co., 3 Sawy. 240.

The chief distinction between voluntary and involuntary bankrupts is in reference to who files the petition in bankruptcy. If the debtor files the petition indicating his desire to surrender his assets and be discharged, it is styled voluntary bankruptcy. If the creditors of the debtor file the petition showing cause why he should be adjudged a bankrupt, it is involuntary bankruptcy.—Cent. Dict., "Bankruptcy."

It is held that the word "uniform" here does not exclude State action unless Congress has acted. And the law of Congress will be uniform though giving creditors the benefit of exemption laws in the State in which they reside; debts being presumed to be contracted in

*The Bankruptcy law now in force was passed in June, 1898, the last act having been repealed in 1878. It was prepared with great care by Judge Jay L. Torrey and carefully considered by the Judiciary Committee of Congress. The aims of the law were to assist honest debtors in making a fair composition with creditors and starting anew free from debt; to enable creditors to compel dishonest debtors to distribute their assets, and by an inexpensive and simple process protect both debtor and creditor in their just rights.

The law provides several grounds on which creditors may proceed against a debtor, while any person owing debts, save a corporation, may become a voluntary bankrupt, and, by declaring his inability to pay the fee required, may secure the benefits of the act without the payment of the fees otherwise required. To be made a bankrupt involuntarily one must owe \$1,000 or more, and be guilty of some act involving fraud.

view of the State exemptions.—*Dozier v. Wilson*, 84 Ga. 801.

State bankruptcy laws, when in force, cannot effect debts previously contracted, as this would impair the obligation of a contract. And State laws can have no application to non-resident creditors unless they voluntarily become parties to the proceedings.—*Brown v. Smart*, 145 U. S. 454.

Cl. 5. To coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures.

Cl. 6. To provide for the punishment of counterfeiting the securities and current coin of the United States.

Sec. 154. TO COIN MONEY AND REGULATE THE VALUE THEREOF.—To coin money is to stamp metal as a medium of exchange according to fixed standards of value. The power was given to Congress and withheld from the States to insure a uniform and stable currency. Congress alone can regulate the value of coins, that is, establish the standard price for metals of a certain weight and fineness. The States are forbidden "to coin money; emit bills of credit (paper money); or make anything but gold and silver coin a tender in payment of debts." The power of Congress extends to establish mints and assay offices, to determine the proportions of alloy and pure metal in coins, and to establish the ratio between respective metals under the bimetallic system, that there may not be two standards of value.

In 1792 Congress fixed the standard of monetary values, and provided that a weight of $371\frac{1}{4}$ grains of

pure silver, called a dollar, should be the unit. As gold was also to be used for money, its relation to silver was fixed at 1 to 15, that is, one weight of gold would be equivalent to fifteen weights of silver. Gold was undervalued at this ratio, and in 1884, the legal ratio was changed to 1 to 16. At this ratio, and upon a bimetallic basis, all the great mass of public and private debts of our country were contracted. February 12, 1873, the gold dollar, of the same weight and fineness as the then ratio fixed, was made the unit. (\$1 equals 25.8 grains troy.) The same law demonetized silver, that is, provided only for the coinage of subsidiary silver and the trade dollar.* Silver to be coined under this law was to be a legal tender only to the amount of \$5, but in the Revised Statutes this provision was without authority or legality extended to all silver. Thus without consideration, and even without the knowledge of the vast majority of the legislators or their constituents the bimetallic system was replaced by the single gold standard, and all debts present as well as those incurred under the former system are payable in gold. The consequences, as well as the expediency of this legislation has been, and is, the leading issue between the political parties. Though of the greatest moment to the entire

*"The reason of the demonetization of the silver dollar was because, on account of its being above par, it had long since disappeared from circulation." Von Holst, Const. Law, 124n. This statement, from an otherwise lucid writer, shows one of the many absurd mistakes which are ignorantly or wilfully made in regard to this vexed question.

nation, because of conflicting individual interests, it must be fought out on political lines.

Sec. 155. WEIGHTS AND MEASURES.—

Under this power Congress has legalized the metric system and established the relations between the customary weights and the lineal, surface, and liquid measures. The power so far as exercised is exclusive, but otherwise each State may regulate the standard of weights and measures.—Black, Const. Law, 212.

Sec. 156. TO PUNISH COUNTERFEITING.

—This power is necessary to protect the money power. The power of Congress is not exclusive of that of the States, and they may also punish such offenses.—Fox v. Ohio, 5 How. 410.

Cl. 7. To establish postoffices and postroads.

Sec. 157. POWER OVER THE MAILS.—The power to establish post-offices and post-roads has been interpreted as giving Congress complete and exclusive control over postal matters. The power extends to the organization of the postoffice department, establishing postal routes, securing or erecting suitable buildings for the accommodation of the mails in the various towns and cities, etc. Congress has declared that every road, including railroads, canals, turnpikes, as well as navigable waters, are post-roads during the time the mail is carried thereon.—Rev. Stat. U. S. 3964. Whether or not Congress has the power to construct post-roads, as well as designate the established roads which when used are postal roads, is somewhat of a mooted question. The

power has been exercised in a few cases by Congress.—See I Kent Com. 268; Story Const., Sec. 1128-50.

Congress may exclude all other agencies from handling mail matter, punish all offenses committed in derogation of its power over the same, and exclude all immoral and indecent matter from the mails.—*La. Lottery Case*, 143 U. S. 110; *Ex parte Jackson*, 96 U. S. 727.

Cl. 8. To promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

Sec. 158. COPYRIGHTS AND PATENTS.—Under this power to promote the progress of science and the useful arts, Congress has passed laws establishing and controlling Copyrights, Patents, and Trade-marks.

A Copyright is simply the right to make copies of a literary production, or a work of the fine arts. It is a grant by the government to an artist, author, or designer, or the assignee, of the exclusive right to multiply copies of his work for a term of years.—*Jeffreys v. Boosey*, 4 House of Lords Cases 920.

A Patent (or letters patent) is a monopolistic grant by the government, under seal, securing to an inventor or his assignee for a limited period, upon compliance with certain conditions, and after an *ex parte* hearing, the exclusive right to make, use and vend any new or useful art, machine, manufacture, or composition of matter.—*Grant v. Raymond*, 6 Pet. 241.

A Trade Mark is the arbitrary or fanciful name, device, or symbol adopted for the purpose of identifying

the origin or ownership of the article to which it is attached.—*Columbia Mill Co. v. Alcom*, 150 U. S. 463.

The term for which copyrights are granted is twenty-eight years, and an extension or renewal of twenty-eight years will be granted to the author, his widow or children, if applied for within six months before the end of the first period. Copyrights are under the direction of the Librarian of Congress, and since 1891 are extended to citizens of countries that permit our citizens the like privilege of copyright. (26 Stat. 1106.) But all books must be printed from type set or plates made in this country. The exclusive right to publish one's writings is given only by statute, the common law simply protects writings and letters from unauthorized publication before their author has given them to the public.—*Wheaton v. Peters*, 8 Pet. 591.*

A patent may be obtained by any person who has invented or discovered any new and useful art, machine,

*The fee for recording each copyright is 50 cents, to copyright a book this fee, together with the title page, should be sent to the Librarian of Congress before the publication of same. As soon as published, two copies of the best edition should be mailed to the Librarian prepaid. Each copy must bear the printed notice of copyright, as: Copyright, 18.., by By addressing the Librarian of Congress, Washington, D. C., the rules of the office and the fees charged for copies of the record may be obtained. Under the act of March 3, 1891, international copyrights may now be secured in Great Britain, France, Germany, Italy, Spain, Portugal, Belgium, Denmark, Switzerland, Mexico, and Chile. See Rev. Stat. U. S., Secs. 4948-71 for Copyright law.

manufacture, or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof and not in use or on sale in the United States for more than two years prior to his application. Rev. Stat. U. S., Sec. 4886. The term for which a patent is granted is seventeen years. The Patent Office is under the Department of the Interior; it is in charge of the Commissioner of Patents, from whom the rules of the office and fees charged may be obtained on application. See Rev. Stat. U. S., Secs. 4883-4936, for law regulating patents.

The control of Congress over copyrights and patents is complete and may be exercised by general or special laws. The States may not regulate or restrict the sale of patent rights, but under their police power they may regulate the use of patented articles.—Patterson v. Ky., 97 U. S. 501.—See *Tod v. Wick*, 36 Ohio St. 370.

Acts of Congress undertaking to secure exclusive rights in the use of registered trade marks are declared invalid under this power, and must be limited to the commerce over which Congress has control, if they are to be valid under the commerce power.—Trade Mark Cases, 100 U. S. 82. Trade marks are registered in the patent office.—See Rev. Stat. U. S., Secs. 4937-47.

Cl. 9. To constitute tribunals inferior to the Supreme Court.*

Cl. 10. To define and punish piracies and felonies committed on the high seas and offenses against the law of nations.

*See Chapter VII. post.

Sec. 159. PIRACY.—Piracy is robbery, or forcible depredation on the high seas. Anything declared by international law to be piracy will be subject to the penalties fixed by Congress for that crime. But Congress may declare certain offenses to be piracies and punish them as such, though they are not piracies under international law.—*United States v. Smith*, 5 Wheat. 153; *The Antelope*, 10 Wheat. 66; 1 Kent Com. 188.

Felonies Committed on the High Seas.—The high seas are by the law of nations regarded as free and open to all; they formerly embraced only waters in which the tide ebbed and flowed, but now extend to all waters outside of the limits of a country, and not within the jurisdiction of a State. The high seas begin at a point three miles from the shore line. The Great Lakes are high seas.—*United States v. Grush*, 5 Mason 290; *United States v. Rodgers*, 150 U. S. 249. The ships of a nation are regarded as carrying its jurisdiction with them on the high seas, and offenses committed on board are considered as crimes against the nation to which the ship belongs.—*United States v. Palmer*, 8 Wheat. 610.

Offenses against the law of nations are such as interfere with the peace and comity between sovereign nations and contravene the established principles of law and order common to all civilized States. Under the power to punish such offenses Congress has passed the "neutrality laws," and laws preventing expeditions to be fitted out against friendly nations.—*Pomeroy*, Const. Law, Sec. 428.

Cl. 11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

Cl. 12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years.

Cl. 13. To provide and maintain a navy.

Cl. 14. To make rules for the government and regulation of the land and naval forces.

Cl. 15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.

Cl. 16. To provide for organizing, arming and disciplining the militia and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress.

Sec. 160. WAR AND MILITARY POWER OF CONGRESS.—The power of Congress over war and military matters is conferred by the above clauses. In the Prize Cases, 2 Black 635, war is defined as “that state in which a nation prosecutes its rights by force.” The question in dispute was whether the late rebellion was a war under international law. Acts of hostility had been going on between North and South, and a blockade declared, though Congress was not in session and had not declared war to exist. The court found that war may exist, though not declared, by reason of hostile acts of a foreign power, or armed insurrection, and may be recognized and repelled by the President as commander-in-chief of the army and navy. When war exists the federal government has all the power of a sovereign nation at war, it is held to have power to

acquire territory by conquest or treaty.—*Insurance Co. v. Canter*, 1. Pet. 511. And it may establish military tribunals in territory in a state of war, and provide provisional courts in conquered territory.—*Jecker v. Montgomery*, 13 How. 498. As a war measure the slaves of persons in rebellion may be given their freedom.—*Slabach v. Cushman*, 12 Fla. 472; *The Grape Shot*, 9 Wall. 129. But the war power is subject to the provisions of the bill of rights, and also to the guaranties of the Constitution to individuals when the civil courts are exercising their functions.—*Ex parte Milligan*, 4 Wall. 2.

By letters of marque and reprisal is meant the power to commission private vessels to attack the commerce of the enemy as a war measure or to obtain redress for the nation. These vessels are known as privateers, and this method of warfare is called privateering. By an international compact many of the leading nations have renounced privateering. Neither the United States nor Spain were parties to the compact, so that each may commission privateers, but neither nation did so in the late war.

Congress must make the rules concerning captures before the right of forfeiture exists for a private citizen, and the right to seize and confiscate the property of belligerents extends to the property of persons in rebellion.—*Brown v. U. S.*, 8 Cranch 110; *Miller v. U. S.*, 11 Wall. 268.

Sec. 161. SAME SUBJECT—TO RAISE AND SUPPORT ARMIES.—This power is subject to the restriction that no appropriation of money to this use

shall be for longer than two years. This limitation is to prevent the executive from maintaining armies without the periodical consent of Congress. The power includes the right to maintain schools of instruction for officers, manufacture arms, etc. The size of the army, and the mode of securing enlistments is for Congress to determine. All persons capable of performing military service may be compelled to do so by enlistment or conscription laws.—Cooley, *Principles*, 3d ed., 99; *Kneeder v. Lane*, 45 Pa. St. 238.

The power of Congress to provide and maintain a navy is plenary, and in regulating the land and naval forces Congress may establish rules, as for punishing officers in the army and navy, for holding courts-martial, etc. But such action must not contravene the Constitutional power of the President as commander-in-chief.

Sec. 162. SAME SUBJECT—USING THE MILITIA.—Militia means the volunteer forces of the State as distinguished from the regular army. They are enrolled and officered, but are State forces until called into the service of the United States. Congress has power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions. These purposes exclude the militia from being called to do service outside of the limits of the United States. But it is held that Congress may confer the power to call out the militia upon the President, and he has then exclusive authority to determine the exigency which shall require their being called out,

and no court can question his decision.—*Houston v. Moore*, 5 Wheat. 1. And the States may aid in calling forth the militia but cannot resist; the President may make the requisition upon the State executive or directly to the militia officers.—*Martin v. Mott.*, 12 Wheat. 19.

Congress provides for the arming, organizing and disciplining of the militia, but the appointment of officers is reserved to the States. The training of the militia in accordance with the discipline prescribed remains in the States, and they have the further power to prevent if they desire all except the regular militia and the military forces of the United States from forming companies and drilling or parading with arms within the State.—*Presser v. Illinois*, 116 U. S. 252. In the service of the Union the militia are subject to the orders of the President as well as any officer of the army who outranks their own officers.—*Black Const. Law* 224.

Cl. 17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased, by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings.

Sec. 163. POWER OVER CEDED DISTRICTS.—This clause was designed to give security and respectability to the federal government. It gives permanence as well as independence to the national capitol.

The District of Columbia was ceded to the United

States and accepted by Congress, and many smaller districts have been purchased by the federal government or reserved from the public domain. This territory being under the exclusive legislation of Congress, and separate and distinct from the States, makes the position of the inhabitants thereof anomalous. They are citizens of the United States, have to pay taxes, serve in the militia, etc., but are not represented in Congress and cannot vote for President. The palpable contravention of the principle of self-government in these cases is excused on the ground of their being necessary exceptions.—*Loughborough v. Blake*, 5 Wheat. 317; *Von Holst Const. Law*, 172-8.

Congress has exclusive jurisdiction over such territory except in cases where the territory has been secured by methods other than those mentioned in this clause, or the States have reserved the right to serve judicial process, tax railroads, and other rights not inconsistent with the use of the territory by the United States.—*Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525; *Benson v. United States*, 146 U. S. 325. The inhabitants of such ceded districts are no longer citizens of the State and can exercise no civilian political functions.—*Soldier's Home Case*, 19 Ohio St. 306.

Cl. 18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officers thereof.

Sec. 164. IMPLIED POWERS OF CONGRESS.—The above clause is the foundation of the

so-called implied powers of Congress. It is sometimes called the "elastic clause," and while it does not enlarge any powers specifically granted, nor confer any new powers, it does fill up, and round out, and make effective in detail the powers which are specifically granted. It is claimed that if this clause had been left out of the Constitution the express grant of powers would have included the powers necessary to carry them into effect, as a grant is always construed to mean something. The clause was to remove uncertainty and guard against a failure of express powers by reason of the inability to make use of the necessary and suitable means at any particular period for their exercise.—2 Story, Const., Secs. 1239-43; Cooley, Principles, 105.

The clause is a troublous one, since in its construction it may be made too narrow or too broad. There is no dispute that it was to remove the necessity of enumerating the specific things that Congress might do in exercising the powers granted. But some have contended that the expression "necessary and proper for carrying into effect," etc., applies only to such as are necessary and indispensable to the powers granted, and that Congress has no choice or discretion as to means. The other view, and the one which has prevailed is, that Congress may use any means appropriate to the end to be effected, and may choose the instrumentality which it considers best adapted to carry out the express powers, and is not limited to those which are strictly indispensable. Congress may judge in the first instance as to what is thus incidental and necessary to exercise its

powers, but the courts finally determine the question when it properly comes before them.—*McCulloch v. Maryland*, 4 Wheat. 316; *Hepburn v. Griswold*, 8 Wall. 603; *Martin v. Hunter*, 1 Wheat. 304; *Legal Tender Cases*, 12 Wall. 457.

McCulloch v. Maryland is the leading case, and upheld the power of Congress to establish a national bank as a beneficial instrumentality to effect the government's fiscal affairs. Ch. J. Marshall holding, "that any attempt to prescribe the means by which the government should at all times execute its powers, or to limit it as to those, without which the power would be nugatory, would be to hamper and obstruct the powers of government." All means fairly adapted to carry out a specific grant are constitutional, and Congress is the sole judge of what is proper within this limitation and not otherwise forbidden.

Under this clause Congress has power to punish offenses against the various federal agencies, to improve rivers and harbors, to lay an embargo, to incorporate a bank, to acquire territory, give a preference to the demands of the United States in a bankrupt's estate, prevent the obstruction of navigation and commerce between States or the transportation of the mails, make its treasury notes legal tender, and forbid federal officers and employes being assessed for political purposes.—*Black*, Const. Law 236-7; *McCulloch v. Maryland*, 4 Wheat. 316; *United States v. Fisher*, 2 Cranch 358; *United States v. Coombs*, 12 Pet. 72; *In re Debs*, 158 U. S. 564; *Legal Tender Cases*, 110 U. S. 651; *United*

States v. Curtis, 106 U. S. 371; Cooley, Principles, 107.*

*In treating the enumerated powers the text included a consideration of the cases which are based to some extent on implied powers. The purpose being to give the scope of each specific grant of power. In some instances the courts do not say to which grant of power the implied power is incident.

CHAPTER V.

POWERS DENIED TO THE UNION AND THE STATES.

Section IX. Power Denied to the United States.

Cl. 1. The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation not exceeding ten dollars for each person.

Sec. 165. SLAVES.—The first clause of section nine embraces the compromise made by the Convention on the slavery question. The clause in effect legalized slavery by forbidding Congress to interfere with the introduction of slaves into States then existing prior to 1808.*

*That the liberty-loving and progressive men who framed the Constitution should not have had the courage to stamp out slavery must ever be a cause of regret. In their defense it may be said that civilization had not reached the plane that it now has in regard to human slavery, and that Anglo-Saxons, while ever willing to battle with Spartan courage for their own liberty, are not solicitous as to the liberty of other races. Some men in the North and some in the South were bitterly opposed to allowing slavery to continue under the new government. But the money-power—then the slave-holding interests—triumphed, and slavery became indigenous to the United States.

The civil war has put an end to literal slavery, and the legal recognition of a human being as chattel property of another human being. But in another form slavery still exists. A man,

Cl. 2. The privilege of the writ of habeas corpus shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it.

Sec. 166. **HABEAS CORPUS.**—This is a judicial writ or order issued by a court requiring the body of a person imprisoned or restrained to be brought into court that the legality of the imprisonment may be investi-

black or white, is nominally free to go where he pleases, work for whom he choose, and to refuse to work if the wages paid are not satisfactory. But the freedom is ever dependent on his possessing the necessities of existence, and these necessities are controlled and monopolized by corporations and trusts whose powers are practically unlimited; hence has arisen industrial slavery, more subtle, but just as oppressive and galling to the individual as the former system.

Rights involve duties. True liberty results as much from restraints imposed as from rights acknowledged. Free opportunity is really anarchy if rights inherent in others are not respected. To have slaves the planters claimed as a right; but not to enslave men is a duty imposed by the fundamental law of a people demanding their own independence. The members of the Convention claimed the right to be free, yet by legalizing slavery they denied the right of a people to be free.

In our day citizens, or aggregations of persons, demand the right to incorporate, to combine, and to form trusts to get the best of other citizens, or control production and distribution, regardless of the rights of individuals and society as declared in the fundamental principles of social organization.

The inalienable rights of individuals are being violated constantly by the monopolization of the mediums of production and distribution, and the results of such violations are just as inimical to the freedom of individuals and the liberties of society as political slavery.

That the State has the power to secure and protect the rights of its citizens in the industrial sphere cannot be doubted. It

gated and determined. This right of an individual to security from arbitrary imprisonment was secured in England in 1679, and is one of the many charter liberties incorporated from English law.

This privilege may be withheld in only two cases, rebellion and invasion, when the common danger is paramount to the right of the individual.

At the outbreak of the rebellion the Attorney General (Bates) was of the opinion that the President could suspend the writ. But the better opinion is held to be that the suspension is a legislative act, and can only be ordered by Congress, or by the President when authorized by Congress. The President was authorized in 1863 to suspend the writ in the whole or any part of the Union which he deemed advisable. This was done, and the law was held constitutional, but to be construed strictly according to its verbal tenor. The law authorized the suspension of the writ, but this was held not to

is an implied power which must be exercised if the express power to secure the general welfare is to mean anything. Whether the power shall be exercised by limiting, regulating and taxing the monopolistic holders of productive agencies, or by complete absorption of the agencies of production and distribution as governmental functions is yet to be decided. One or the other must be done, or we may expect to see evolved a few gigantic monopolies, controlled by a clique of individuals, with coercive powers over individuals and the Nation greater than that of the Caesars of Rome or the King-makers of England. If the industrial world should come to this pass it will be necessary to begin over again the struggle for liberty which the race has gone through in overthrowing the despotism of political monopoly.

authorize an arrest without legal cause.—*Ex parte Miligan*, 4 Wall. 133.

Cl. 3. No bill of attainder, or ex-post-facto law, shall be passed.

Sec. 167. **BILL OF ATTAINDER.**—In English law a bill of attainder was an act of Parliament declaring a person guilty of crime and pronouncing a sentence of death against him with forfeiture and corruption of blood, that is, destroying the inheritable quality of the person's blood. The bills were usually employed against political offenders at the instigation of the king, and the action taken was unjust and tyrannical. Both the federal and State governments are forbidden to pass bills of attainder, as it was seen that they were capable of being used as instruments of oppression. Bills of pains and penalties were similar to bills of attainder, except that the death penalty was not imposed. These are included in the inhibition, and the legislatures have no power to punish crimes by direct legislative action.—*Fletcher v. Peck*, 6 Cranch 138; *Ex parte Garland*, 4 Wall. 338. It is held that the States may not indirectly pass such bills, as by providing a test oath for the exercise of a calling or profession, in which the individual would have to testify that he had not been guilty of disloyal acts toward the national government in the past, as this legislation was designed to exclude those who were guilty of the conduct specified, and such persons would therefore be legislatively punished without trial.—*Ex parte Garland*, *supra*; *Cummings v. Missouri*, 4 Wall. 227; *Cooley*, *Principles*, 311.

Sec. 168. **EX POST FACTO LAWS.**—Literally speaking, an *ex post facto* law is one passed “after the fact,” that is, later in time than the deed or act to which it relates. Unrestricted the term would include all retroactive legislation in civil as well as criminal cases; but it was early decided that the term as employed in the Constitution is limited exclusively to laws of a criminal nature. The same case specifying *ex post facto* laws as follows:

1. One which makes an act done before the passing of the law and which was innocent when done, criminal, and punishes it as such.

2. One that aggravates a crime, or makes it a greater offense than it was when committed.

3. One that changes the punishment, or inflicts a greater punishment than the law imposed when the crime was committed.

4. One that alters the legal rules of evidence, and receives less or different testimony in order to convict, than the law required when the offense was committed.

—*Calder v. Bull*, 2 Dall. 386.

To these Judge Cooley adds the following:

5. “Every law which, assuming to regulate civil rights and remedies only, in effect imposes a penalty or the deprivation of a right for something which when done was lawful.

6. “Every law which deprives persons accused of crime of some lawful protection to which they have become entitled; such as the protection of a former con-

viction or acquittal, or of a proclamation of amnesty.”
—Principles, 3d ed., 313.

The following are held not to be *ex post facto* laws:

One that changes the punishment by lessening it, or affects merely prison discipline.—*Hartung v. People*, 22 N. Y. 95; *Clarke v. State*, 28 Miss. 261.

One that changes the practice but does not deprive the accused of his substantial rights, or which affects the privilege of mere technical objections.—*Duncan v. Missouri*, 152 U. S. 377; *Cook v. United States*, 138 U. S. 157; *Commonwealth v. Hall*, 97 Mass. 570.

One providing that the punishment of future offenses shall be graduated according to the past conduct of the accused, and be more severe in case of previous conviction.—*Commonwealth v. Graves*, 155 Mass. 168; *Black*, Const. Law, 598-9.

Cl. 4. No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.*

Cl. 5. No tax or duty shall be laid on articles exported from any State.†

Cl. 6. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.†

Cl. 7. No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

*Treated under the taxing power, ante, section 137.

†Noticed under the commerce power.

Sec. 169. APPROPRIATIONS.—The control over grants of money to the needs and expenses of the government is in the hands of the legislature. Appropriations are usually made each year for the current expenses and for such national improvements as Congress desires to make. Appropriations are made without regard to the receipts of the government, and this results from time to time in a deficit which has to be met by borrowing money on the credit of the government.—See Von Holst, *Const. Law*, 127-135.

Cl. 8. No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state.

Sec. 170. TITLES OF NOBILITY, PRESENTS, ETC.—This clause was to insure the absolute political equality of citizens under the government, as well as protect us from foreign influence by bribes appealing to the vanity of our officers. The framers of the Constitution realized that nobility is not to be conferred by law, that it is an inherent quality; and that the attempted preferment of certain men and their heirs by law was a signal failure.*

Section 10. Powers Denied to the States.

Cl. 1. No State shall enter into any treaty, alliance, or confederation, grant letters of marque and reprisal, coin money,

*“The Nobility! That is to say, two classes of men—the one for grandeur, the other for debasement; the one for tyranny, the other for servitude! The Nobility! Ah! The very word is an insult to the human race!”—Vergniaud.

emit bills of credit, make anything but gold and silver coin a tender in payment of debts, pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

Sec. 171. LIMITING THE POWER OF THE STATES.—There are two classes of prohibitions to be noticed: 1, Those directed both to Congress and to the States, and, 2, those laid upon the States alone. Of the powers denied, a number have been considered in treating the powers of Congress and will not be adverted to here.

Bills of Credit.—These are bills issued by the State, designed to circulate as money on the credit of the State and in the ordinary uses of business.—*Craig v. Missouri*, 4 Pet. 410. But the bills of a bank chartered by the State, and whose stock is owned by the State are not bills of credit; nor are coupons of State bonds, though made receivable for taxes.—*Briscoe v. Bank*, 11 Pet. 257; *Poindexter v. Greenhow*, 114 U. S. 270.

Sec. 172. LAWS—IMPAIRING THE OBLIGATION OF CONTRACT.—This prohibition applies to the States alone and is not extended to the federal government. The inhibition was intended to prevent the States from repudiating their debts, but it has been construed to include every enforceable contract made by individuals or States, executed as well as executory, express or implied, including contracts between States. But the contract must be one which is enforceable by legal process.—*Green v. Biddle*, 8 Wheat. 1; *Fletcher v. Peck*, 6 Cranch 87. The provision is held

not to extend to protect statutory grants of licenses or exemptions, the tenure of public offices, judgments, or the contract of marriage from impairment by law.—Black, *Const. Law*, 612-615; *Stone v. Mississippi*, 101 U. S. 814; *Butler v. Pennsylvania*, 10 How. 402; *Garrison v. City of N. Y.*, 21 Wall. 196; *Cronise v. Cronise*, 54 Pa. St. 255.

In 1819 the courts were called upon to decide whether a charter granted to a corporation was protected by this clause. In the case of *Dartmouth College v. Woodward*, 4 Wheat. 519, this question was decided, and the court held that a charter is a contract within the meaning of the Constitutional provision and when once granted by a State it is made irrevocable by the legislature.*

The principle decided in the *Dartmouth College* case was applied to all business corporations, and while modified in various ways it is still affirmed by the courts. The principles which modify the doctrine are:

1. All charters are to be strictly construed. So where a grant is made to one corporation to build a bridge or take toll, and later a similar grant is made to another corporation, in the absence of an express grant of the exclusive privilege to the first corporation, the second grant will be valid even though it injures the business

**Dartmouth College Case*: The charter had been derived by the College from Royal authority, and the Legislature of New Hampshire wished to change it, but was prohibited from doing so under the provision against impairing the obligation of contract.

of the first corporation.—*Charles River Bridge v. Warren Bridge*, 11 Pet. 420. If the exclusive privilege is granted this becomes a part of the contract and cannot be impaired.—*New Orleans Gas Co. v. La. Light Co.*, 115 U. S. 650.

2. Corporate franchises, including exclusive ones, may be taken under the State's right of eminent domain, provided the required compensation is given.—*Cooley*, Principles, 337-38.

3. Legislatures may always reserve the right to alter, amend, or repeal a charter, and this is invariably done either by the legislature or the Constitution of the State.

4. A State cannot divest itself by contract or otherwise of its essential powers over all public matters, and of its powers to regulate the business of corporations conducting enterprises of a public nature. In *Munn v. Illinois*, 94 U. S. 113, it is held that in the case of an individual proprietor of a grain elevator, the business is so far of a public nature that the State may regulate the charge of the service, the court holding that the furnishing of the necessities of life has always been subject to public control. So the rates and charges of transportation companies may be regulated by the State, though the companies are given this right in their charters.—*Stone v. Farmers Loan Co.*, 116 U. S. 307.

5. Another check which the States have on chartered corporations is under their police power. The public health, safety and morals are superior, and will justify an interference with the franchise of corporations by regulations or otherwise.—*Beer Co. v. Massachusetts*,

97 U. S. 25. In this case a statute of the State which forbade the manufacture and sale of malt liquors was upheld, though it impaired the charter of the beer company, the court holding that the right given by the charter was not more sacred than a private citizen would have. See *Fertilizer Co. v. Hyde Park*, 107 U. S. 667.

Municipal corporations are not included with the private and quasi-public corporations, whose charters are contracts protected by this clause. They are State agencies created for convenience in government and their powers and privileges are subject to recall at all times.—*East Hartford v. Hartford Bridge Co.*, 10 How. 511; *Essex Board v. Skinkle*, 140 U. S. 384.

“The obligation of a contract is the binding force on the party making it, which the law at the time recognizes, and for the disregard of which it gives a remedy.” —Cooley, *Principles*, 330.

Sec. 173. SAME SUBJECT—IMPAIRMENT OF THE OBLIGATION.—Among the legislative acts which would impair the obligation of a contract are: Statutes relieving one party of his legal undertaking, or depriving the other party of the fruits of the undertaking, as the law imposes upon a person undertaking to do a thing the duty of performing it. But such undertaking must be legal and upon a consideration of it will not be enforced. So any law which enlarges or abridges the intention of the parties, or which postpones or hastens the time of performance, or which makes the promise invalid, or puts new terms into it, impairs its

obligation.—Black, Const. Law, 607; *Planters' Bank v. Sharp*, 6 How. 301.

A distinction is to be made between impairing the obligation of a contract and impairing the remedy for a breach of contract. While the legislature cannot abolish all remedies on a contract, it may change or alter the remedy providing the contract is not left unenforceable. Thus a change in the statute of limitations does not impair a contract.—*Sturges v. Crowningshield*, 4 Wheat. 122. But such statute must leave a reasonable time within which to bring an action.—*Mitchell v. Clark*, 110 U. S. 638. So the abolition of imprisonment for debt, though made to apply to antecedent contracts, affects only the remedy and does not impair the obligation of the contract.—*Ogden v. Saunders*, 12 Wheat. 218.*

Cl. 2. No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on

*It is not attempted to give all the provisions relating to this subject of impairing the obligation of contracts at this time. In Number 4 of the *Cyclopedia of Law*, under the subject of Contracts, it will be dealt with more fully.

There is some dispute as to whether Congress is restrained from impairing the obligation of contract. That Congress has done so is not to be disputed; the legal tender acts making treasury notes pay pre-existing debts is an example, so the demonetization of silver is an example of appreciating pre-existing debts. The better opinion in view of these facts is that Congress is not restrained, and that the remedy for such action by Congress is political and not judicial. *Mitchell v. Murphy*, 110 U. S. 638.

imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

Cl. 3. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

Sec. 174. RESTRICTION AS TO TONNAGE, ETC.—These restrictions on the power of the State are demanded because of the federal character of the Union, as well to prevent a clash between the two authorities as to insure uniform and single action. Tonnage duty is a tax laid on a vessel for the privilege of navigation, and would prove, if exercised by the States, a power to regulate commerce. Wharfage dues may be levied in proportion to tonnage.—*Packet Co. v. Keokuk*, 95 U. S. 80.

Sec. 175. IMPLIED RESTRICTIONS.—Without being expressly stated the power of legislation, State and National, is limited in the following respects: 1. The power to legislate cannot be delegated, as to another department of government. This trust is confided to the legislative body alone.—*Cooley*, Const. Lim., 6th ed., 137-146. 2. A legislature cannot limit by any action the power of its successors, as by passing an irrevocable law.—1 Bl. Com. 90; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387; 3. Legislation is to redound to the public good, and not to the preferment of individuals.—*Cooley*, Principles, 3d ed., 112.

CHAPTER VI.

THE EXECUTIVE DEPARTMENT.

Sec. 176. The executive officer of the Union and the head of the executive department is called the President. This term signifies a presiding or controlling officer, and had been used to designate the chief executive officer in several of the States after 1776. In the Convention there was some dispute as to the term for which the President should be chosen; some favored a life term while others would have limited the term to one year. Four years was the compromise agreed upon.

ARTICLE II.

Section 1. President and Vice President.

Cl. 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected as follows:

Cl. 2. Each State shall appoint, in such manner as the legislature thereof shall direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

Cl. 3.* The electors shall meet in their respective States, and vote by ballot for two persons, one of whom at least shall not be an inhabitant of the same State with themselves. And

*This clause has been altered by the XII. Amendment. See Ch. IX., post.

they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit, sealed, to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then, from the five highest on the list, the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.

Cl. 4. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes, which day shall be the same throughout the United States.

Cl. 5. No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

Cl. 6. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President; and the Congress may by law provide for the case

of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President; and such officer shall act accordingly, until the disability be removed or a President shall be elected.

Cl. 7. The President shall, at stated times, receive for his services a stated compensation, which shall neither be increased or diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Cl. 8. Before he enter on the execution of his office he shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect and defend the Constitution of the United States."

Sec. 177. ELECTION, QUALIFICATIONS, ETC., OF PRESIDENT.—Section 1, of Article II, prescribes the method of electing the chief executive officer. By the Constitution the election was intended to be an indirect one by electors chosen in the several States who should meet and independently select the executive officer. Custom has changed this, and, at the same time the people vote for electors, which is the universal method of choosing these officers, they vote for designated persons for President and Vice President, and though the electors meet and go through the formality of voting, their decision is always in accordance with the platform on which they were elected.

Congress has fixed the first Tuesday after the first Monday in November of every fourth year as the time of choosing Presidential electors, and this is known as a Presidential election. The electors do not meet until

the first Wednesday in December to cast their votes as directed by the Constitution.

It was early found that the plan of having the Vice President of a different political party from the President, which was the result of the method of election, was not consistent with harmonious executive action, and the XII. Amendment was adopted providing that the electors should vote in distinct ballots for President and Vice President, thus insuring that both shall belong to the same political party.

Congress has provided by Act of 1886, 24 Stat. at Large, 1, that in case of the disability, or removal of both President and Vice President for any cause the office shall devolve on the following officers in the order stated: Secretary of State, Secretary of the Treasury, Secretary of War, Attorney General, Postmaster General, Secretary of the Navy, Secretary of the Interior. But any such officer must be constitutionally eligible and be confirmed by the Senate.

Section 2. Powers of the President.

Cl. 1. The president shall be commander-in-chief of the army and navy of the United States and of the militia of the several States when called into the actual service of the United States. He may require the opinion in writing of the principal officers in each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

Sec. 178. COMMANDER-IN-CHIEF.—As the executive head of the Union, the President has chief

command of the military forces of the Nation. This power is construed to make him the executive head rather than the actual military commander of the forces in the field. His direction and power is exercised through the War Department and not directly over the troops.—*United States v. Eliason*, 16 Pet. 291. The powers of the President in this regard are at all times subject to the law of the land, and any action not warranted by law will be void.

The “principal officers in each of the executive departments,” whose opinions the President may require in regard to the duties of their respective offices, form what is known as “the Cabinet.” The heads of the Departments, of which there are now eight, are customarily summoned in a body to advise the President.* Being executive agents, the official acts done by the heads of departments are regarded as the acts of the President, and for which he is politically responsible. But for executive acts the President is not to be called to account save by impeachment.—*Wilcox v. Jackson*, 13 Pet. 498; *Marbury v. Madison*, 1 Cranch 137; *Durand v. Hollis*, 4 Blatch. 451. Where duties are specifically imposed on the heads of departments, they are responsible.—*Kendall v. United States*, 12 Pet. 524.

The pardoning power of the President extends only to offenses against the United States, and does not apply to impeachments. A pardon relieves the person

*The Department of Agriculture was added as an executive department in 1889.

from all consequences of the criminal act, save where rights of third persons to property or a share in a fine have become vested.—*Osborn v. United States*, 91 U. S. 474. The pardon may be given to a person convicted; to a described class of persons before conviction; to all persons guilty of a specified offense. In the first case the pardon takes effect upon delivery, in the second case the pardon removes the possibility of prosecution or conviction, and in the third case the pardon is effective from the signing of the general proclamation.—*United States v. Norton*, 97 U. S. 164; *Cooley, Principles*, 115-116.

Cl. 2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.

Cl. 3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate by granting commissions, which shall expire at the end of their next session.

Sec. 179. POWER OVER TREATIES.—The making of treaties is usually an executive function solely, but as a check on the executive the Senate is required to concur in the exercise of the power. And where the treaty requires the appropriation of money

to carry it out the lower house, by its sole power over appropriations, has a secondary control over the treaty.

A treaty is a compact between two sovereignties, and not a legislative act. Though by Article VI., cl. 2, treaties are given the authority of laws, yet unless the treaty itself prescribes a rule by which private rights are to be determined, it is a mere compact, and cannot be enforced by the courts until the legislature by its action has made it operative.—*Head Money Cases*, 112 U. S. 580; *Foster v. Neilson*, 2 Pet. 253.

Treaties that are operative are a part of the supreme law of the land and overrule conflicting laws of an earlier date, and all contravening State action. But a treaty being of no greater validity than other acts of Congress, it may be superseded by any subsequent action of Congress inconsistent with it.—*Cherokee Indians*, 11 Wall. 616.

Sec. 180. POWER OVER APPOINTMENTS.
—The power of the President to appoint civil officers is one of great importance, and it was a wise check upon the power that such appointments should be ratified by the Senate. The question has arisen: Does the power to appoint include the power to remove, and is it in the power of the President to remove officers without the consent of the Senate? The better opinion seems to be that the President may remove officers without the consent of the Senate.—*Black*, Const. Law, 118; *Pomeroy*, Const. Law, Secs. 647-661. Congress, however, in 1867, by the Tenure of Office Act (Rev. Stat. U. S., Sec. 1767), provided that every civil officer should hold

until removed with the consent of the Senate, or until the appointment of a successor with the consent of the Senate. This act was repealed in 1887 without having been passed upon by the Supreme Court. The question is still a debatable one. Inferior officers Congress may authorize the heads of departments to appoint, and these officers it may protect from removal without infringing upon the executive power.—United States v. Perkins, 116 U. S. 488. In 1888 Congress, by the Civil Service Act, classified the various official positions under the government, and about 80,000 of the 179,000 persons in the Executive Civil Service are subject to a competitive examination under the rules of the Civil Service Commission, and are not to be removed except for just cause and upon written charges filed with the head of the department, and upon giving the accused full notice and opportunity for defense.*

Section 3. Duties of the President.

He shall from time to time give to Congress information of the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them; and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive ambassadors and other public ministers; he shall take care that the laws be faith-

*The address of the Civil Service Commission is Washington, D. C. Application blanks for examination may be obtained from this commission as well as information concerning the Civil Service. See World Almanac, 1899.

fully executed, and shall commission all the officers of the United States.

Sec. 181. EXECUTIVE DUTIES.—The President is required to furnish Congress information on the state of the Union. Jefferson was the first to send this information in a written message. The former practice having been for the executive to meet the two houses of Congress and address them, recommending such legislation as he deemed important. The precedent of Jefferson has been followed, and this communication is now known as the President's message.

It is the President's duty to see that the laws be faithfully executed. It is clear that the President's duty here extends not only to the enforcement of the acts of Congress, according to their express terms, but also extends to and covers the protection and enforcement of rights given by the Constitution and by treaties made with foreign countries. That he may be able to enforce the laws of the Union the President is made commander-in-chief of the army and navy, has the appointing authority for all branches of the Executive Civil Service, and the various executive departments are under his control and direction. He is not subject to the control of the legislative or judicial departments except by impeachment. Though the President cannot declare war he may and should meet with force a foreign invasion or a domestic rebellion without awaiting for Congress to act. It is for him to decide whether the facts justify the establishment of a blockade and the according of belligerent rights.—Prize Cases, 2

Black 668. Congress having left it to him to call out the army when the exigency demands, or on the application of the States, he is the sole judge of the existence of facts warranting the employment of the militia.—**Luther v. Borden, 7 How. 1.**

Though Congress cannot confer upon the President any of its legislative powers, yet it may invest him with the general power to suspend the operation of a law upon certain contingencies.—**Field v. Clark, 143 U. S. 649.**

Section 4. Impeachment of the President.

The President, Vice President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

Sec. 182. IMPEACHMENT.—The President, Vice President and all civil officers are subject to impeachment; this clause is held to include all civil officers commissioned by the President under Section 3, of this article, save those employed in the land and naval forces.

The crimes and offenses for which these officers may be impeached extend to any act of a character to render the accused unfit to hold office, or which the House considers deserving of punishment. The offenses are not necessarily punishable under the general laws, it is the misconduct in office, and abuse or betrayal of the trust reposed in the official, which most frequently deserves punishment in this way.—**Pomeroy, Const. Law, Secs. 717-727; 1 Story, Const., Secs. 796-805; Foster, Com. on the Const., Ch. 13.**

CHAPTER VII.

THE JUDICIAL DEPARTMENT.

Sec. 188. **THE JUDICIARY AS A GOVERNMENT DEPARTMENT.**—The position of the federal judiciary as one of the three co-ordinate branches of government, and the construction which has been put upon its power to ascertain and apply the law, makes it an important factor in a constitutional government. In England all laws stand upon the same basis, and the courts have no power to declare constitutional principles superior to acts of Parliament.—1 Bl. Com., 91. But in the United States the laws of Congress and of the States are subject to the scrutinizing gaze of the Supreme Court, which has power, as a branch of the government, to declare them void if they are contrary to the Constitution,—the paramount law of the land. This power of the court does not make it superior to Congress, as its power is limited to declaring what is the law as between the acts of Congress and the provisions of the Constitution. The authority of the court to declare the action of Congress void for being repugnant to the Constitution was clearly laid down in 1803 by Ch. J. Marshall in *Marbury v. Madison*, 1 Cranch 137. The right was based upon the fact that if the action of the legislature could not be passed upon by the court, Congress

would be made supreme and the Constitution virtually annulled.

In the exercise of its final authority over laws the judiciary never interferes with political questions; and neither Congress nor the President are authorized to call upon the courts for advice in political matters, or to ascertain beforehand their opinion of contemplated action. Questions of war and peace, the recognition of governments, the jurisdiction of the United States over an island on the high seas, etc., are political questions, and are left to be determined by the other departments of government.—United States v. Anderson, 9 Wall. 56; *Gelston v. Hoyt*, 3 Wheat. 246. The courts only act upon constitutional questions when these come before them in the regular course of proceeding in suits between parties, and are necessary to a final decision of the cases. The courts in making decisions on constitutional questions have adopted the following general rules: 1. That such questions should be considered by the full bench, that is, with all the judges present. 2. A decision on the very point of constitutionality must be necessary to decide the case. 3. The rights of a party to the suit must be affected by the law which is being contested as unconstitutional, and no third person can raise such question. 4. The court will not declare a law unconstitutional on the ground of violating natural, political or social rights, unless such rights are protected in the Constitution. 5. By the weight of authority it is held that the court will not declare a law unconstitutional on principles

not expressed in the Constitution.—*Illinois Cent. R. R. Co. v. Illinois*, 146 U. S. 387; *State v. Snow*, 3 R. I. 64; *Black, Const. Law*, 57-68.

In the interpretation of the Constitution the courts observe the following rules: 1. The instrument is read in the sense of the terms that are used; its plain objects and aims are controlling. 2. The interpretation of the framers of the Constitution and the early courts are aids, but are not conclusive. 3. The practical administration of the departments of government is to be considered in determining their powers. 4. The Federal government is one of enumerated powers. 5. The powers positively limited are not to be enlarged under any theory of incidental powers. 6. Merely verbal criticism of the Constitution is to be avoided. 7. The Constitution of the United States is a whole, and is a charter for a national government. See *Von Holst, Const. Law*, 55.

ARTICLE III.

Section 1. The Federal Courts.

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

✓ Sec. 184. THE FEDERAL COURTS.—The Constitution declares that the judicial power shall be exercised by the Supreme Court and such inferior courts as Congress may establish. Thus it is left for

Congress to determine of what the Supreme Court shall consist, and to establish the minor courts and apportion among them the judicial power of the United States. By the Judiciary Act of Sept. 24th, 1789, the framework of the federal judicial system was established. A Supreme Court, three Circuit Courts, and thirteen District Courts were provided for. The Supreme Court as established consisted of one chief justice and five associate justices. The number of the associate justices have since increased to eight, so that the court now consists of nine judges, six of whom must be present to decide a case.—Von Holst, Const. Law, 99. The Circuit Courts have been increased to nine; each circuit embraces the territory of several States. At first the Judges of the Supreme Court went on the circuit and held court, but later it was found necessary to appoint Circuit Judges, and at present there are two or more Circuit Judges in each circuit. The Circuit Judges in each circuit sit with one of the Justices of the Supreme Court to make up a Circuit Court of Appeals. (26 Stat. at Large, 826.) The District Courts have each one judge, and have been increased in number until at present (1899) there are seventy-two District Courts. Each State or Territory has one or more District Courts.

In 1855, the Court of Claims was established to hear and determine claims against the government founded on any law of Congress, regulation of the executive department, or on contract with the government, and such claims as are referred to it by either house of Con-

gress. From the Court of Claims appeals may be taken to the Supreme Court.

Congress also establishes courts for the Territories and for the District of Columbia. But the judges of territorial courts are not protected from removal by the Constitutional provision asserting that federal judges shall hold during good behavior.—*Insurance Co. v. Canter*, 1 Pet. 546.

Section 2. Jurisdiction of Federal Courts.

Cl. 1. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects.

Sec. 185. JURISDICTION OF THE FEDERAL COURTS.—The Constitution defines the general jurisdiction of the federal courts in nine different clauses, and it is this jurisdiction that Congress has by the Judiciary Act apportioned among the various federal courts. The powers of the courts are further confined to applying the law in cases which have been submitted by actual parties and in the form required by law. We shall consider the several cases to which the federal judicial power extends:

1. Where a federal question is involved, that is, one arising under the Constitution, laws, or treaties of the United States, it is evident that the federal judiciary should have jurisdiction to preserve uniformity in the decisions as well as to be independent in the construction and enforcement of its own laws. The Judiciary Acts, in giving effect to this provision, provide that where the constitutional right of any person has been effected by the final decision of the highest State court, and the decision has been adverse to the right, the case may be removed by a writ of error to the Supreme Court for examination and decision.—Rev. Stat. U. S., Sec. 709.

2. Ambassadors, Ministers and Consuls. These persons are the representatives accredited to our national government, and it alone should have power to determine cases affecting them.—*Davis v. Packard*, 7 Pet. 276.

3. All cases of Admiralty and Maritime Jurisdiction. These two words confer a wider jurisdiction than the word admiralty alone would have done. Admiralty jurisdiction extends to acts or injuries done upon the high seas, or within the ebb and flow of the tide; the word maritime extends the jurisdiction to all contracts, claims, services and matters purely maritime, and the jurisdiction under the one or the other is made to extend to the Great Lakes and to navigable rivers, though entirely within a State.—Story, Const., Sec. 1666; *The Genesee Chief*, 12 How. 443; *Jackson v. The Magnolia*, 20 How. 296. The admiralty jurisdiction of the

United States within a State does not divest the State of its power over fisheries, or of its powers to punish crimes.—*United States v. Bevens*, 8 Wheat. 336; *Manchester v. Massachusetts*, 139 U. S. 240.

4. Controversies to which the United States Is a Party. The United States cannot be sued without its consent. By the establishment of the Court of Claims it has given its consent to have certain cases against it determined. As plaintiff the government may sue in the federal courts the same as any other suitor.—*Ableman v. Booth*, 21 How. 506.

5. Controversies Between Two or More States. The suits in which States are parties are chiefly boundary disputes, and these are properly cognizable in the federal courts.—*Rhode Island v. Massachusetts*, 12 Pet. 657. By "States" is here meant States of the Union, and a suit could not be maintained by an Indian tribe against a State. *Cherokee Nation v. Georgia*, 5 Pet. 1. And in *Texas v. White*, 7 Wall. 700, it was held that a State in rebellion and not restored to peaceful relations was not a State within the meaning of this clause.

6. Suits Between a State and Citizens of Another State. When a State is obliged to sue to maintain its rights or protect its citizens, it is proper that the suit should be in the federal court if against the citizens of another State. But it would not be in accordance with the general supremacy of the States in all matters not delegated to the Union, to permit a State to be sued by citizens of another State. The original language of

the Constitution was construed in *Chisholm v. Georgia*, 2 Dall. 419, to give an individual citizen of one State the right to sue another State. This decision gave rise to the 11th Amendment, which declares that "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

7. *Between Citizens of Different States.* This class of cases constitutes a large part of those adjudicated in the federal courts. The fact of diverse citizenship must appear on inspection of the record of the case, and a resident of one of the Territories or of the District of Columbia cannot sue or be sued as a citizen of a State.—Cooley, *Principles*, 136-7.

8. *Citizens of the Same State Claiming Lands Under Grants of Different States.* The dispute here is really between the States.

9. *Suits Between a State or Its Citizens and Foreign States, Citizens or Subjects.* Under this clause it is held that our courts are not open to aliens when their country is at war with our own. There is nothing to compel a foreign state to come into our courts to sue or defend, but it may do so.

Sec. 186. **WHAT LAW GOVERNS THE FEDERAL COURTS.**—The distinction between the common law and equity is observed by the federal courts. There is no common law of the United States, and it is the common law and usages of the several States which

govern the decisions of the courts. When the matter is of local importance to the State the decisions of the State courts will be followed, but if of a general nature, as mercantile and commercial law, it is the general principles of the law which govern. In equity the court has established rules in which it is provided that cases not within the rules will be governed according to the ancient practice in England. In punishing crimes the federal courts are limited to the offenses specified in the federal laws, treaties, or Constitution.—United States v. Hudson, 7 Cranch 32; *Pana v. Bowler*, 107 U. S. 529.

Cl. 2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

Sec. 187. ORIGINAL AND APPELLATE JURISDICTION.—Original jurisdiction is the power to entertain an action from its commencement; while appellate jurisdiction extends to review cases arising under the jurisdiction of inferior tribunals. In the above clause the Supreme Court is given original jurisdiction in certain cases, and the courts have construed the provision to deny the Supreme Court original jurisdiction in all other cases.—*Marbury v. Madison*, 1 Cranch 137. In which case the authority of the Supreme Court to issue a mandamus to one of the heads of the executive department was denied, though au-

thorized by the Judiciary Act. It was long contended that Congress could not confer upon the inferior federal courts jurisdiction of the matters over which the Supreme Court had been given original jurisdiction. In *Bors v. Preston*, 111 U. S. 252, it is held that original jurisdiction does not exclude the jurisdiction of other courts.

The appellate jurisdiction not being defined by the Constitution must be regulated by the action of Congress. Appeals are provided for in the judiciary act; many cases are allowed to be finally decided in the lower federal courts. In some cases appeals may be had without reference to the amount in dispute, but as a rule there can be no appeal from the Circuit Court unless \$5,000 is involved in the judgment. Questions of jurisdiction, cases under the revenue laws, etc., are appealable without reference to the amount in controversy.—*Handley v. Stutz*, 187 U. S. 366; 25 Stat. at Large, 698.

On a writ of error only questions of law are reviewed, but in equity cases the whole proceedings of the lower courts are taken up. In all cases of appeal the decision of the lower court must have been final, and the general test of this is whether anything further remains to be done to close up the suit other than a mere computation. Appeals must be taken within two years, and any party to the record has the right to appeal. Cases may be sent to the Supreme Court by the judges of the lower courts where they are unable to agree, or consider the question of such importance as to demand an

opinion of the higher court, irrespective of the amount in controversy.

Sec. 188. EXCLUSIVE AND CONCURRENT JURISDICTION.—We have already seen in another connection, that the grant of certain powers to the federal government does not necessarily exclude the authority of the States over the same matters. The Constitution does not provide that the judicial power of the United States shall be exclusive of the States, and unless Congress, in providing for the exercise of the powers, makes the jurisdiction of the federal courts exclusive, suits may be instituted in the State courts, though within the grant of power to the federal courts. Congress has made the jurisdiction of the federal courts absolutely exclusive in the following class of cases:

1. Crimes and offenses against the United States.
2. Penalties and forfeitures under the laws of the United States.
3. All civil cases under the admiralty and maritime jurisdiction.
4. All seizures under the laws of the United States.
5. Cases arising under the patent and copyright laws.
6. All proceedings in bankruptcy.
7. All controversies of a civil nature where a State is a party, except between a State and its citizens, and between a State and citizens of other States or aliens.—Rev. Stat. U. S., Sec. 711; Cooley, Principles, 188.

The federal courts have concurrent jurisdiction with the State courts in all suits of a civil nature, in law or equity, where the matter in dispute exceeds, exclusive of interests and costs, the value of \$2,000, and

arising under the class of cases over which the federal courts are given jurisdiction.

Provision is made for the removal of cases commenced in the State courts to the federal courts where such cases are properly cognizable in the federal courts.—Cooley, Principles, 141-2; *Mitchell v. Smale*, 140 U. S. 406; 25 Stat. at Large, 484.

Sec. 189. **HABEAS CORPUS.**—The writ of habeas corpus may be issued by the Supreme, Circuit and District Courts, or by the various judges of these courts, but the use of the writ by the federal courts is a limited one, and the general authority to inquire into restraints upon personal liberty is reserved to the State courts. The Supreme Court, except in cases affecting ambassadors, ministers and consuls, or where a State is a party, can only issue the writ in aid of its appellate jurisdiction.—*Ex parte Watkins*, 7 Pet. 568; *Ex parte Dorr.*, 3 How. 108; *Baker v. Grice*, 169 U. S. 284.

Cl. 3. The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

Sec. 190. **JURY TRIAL.**—This clause was to make the federal courts amenable to the general principles of civil liberty in regard to jury trials held in the vicinity where the crime was committed. The jury meant is the common law jury of twelve men.—*Thompson v. Utah*, 170 U. S. 848.

Section 3. Treason.

Cl. 1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

Cl. 2. The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

Sec. 191. TREASON.—The Constitutional definition of treason is that of the Statute of Treasons, 25 Edw., III. (1852). It excludes constructive treason by declaring that the intent must be evidenced by an overt act, specifically named. A mere conspiracy to subvert the government is not treason, unless there is an actual levying of war.—*Ex parte Bollman*, 4 Cranch 75. See Cooley, Principles, 814-815. The giving of information, provisions, alms, etc., to the enemies of the United States would be treason. It is not treason to kill the President.

The limitation in the Constitution on the power of Congress to punish treason was to prevent the misuse of the power as had been done in the past. At common law conviction of treason worked a corruption of blood and forfeiture of the estate of the person attainted. The punishment fixed for treason is hanging.

CHAPTER VIII.

STATE RECORDS, PRIVILEGES OF CITIZENS, ETC.

Sec. 192. NATIONALIZING PROVISIONS.

—In the establishment of a Federal government with a number of individual States, the framers of the Constitution recognizing the importance of providing certain unifying provisions that the citizens of distinct States might not, as a result of hostile legislation between the States, come to regard themselves as aliens and foreigners when beyond the limits of their own State and yet within the limits of the United States. By the provisions of Art IV., what might otherwise have to depend upon rules of comity between the States is made a Constitutional obligation between the constituent parts of the Federal Union, and the rights and privileges of citizens of the several States are protected by uniform provisions, though the local independence of the States is not molested.

ARTICLE IV.

Section 1. State Acts and Records.

Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof.

Sec. 193. "FULL FAITH AND CREDIT."—
By full faith and credit is meant that each State must

recognize fully the action of other States in the exercise of their lawful jurisdiction. It does not extend the jurisdiction of one State into the territory of another. The process from the courts of one State cannot run into another State, but constructive service by publication is sufficient when property is within the jurisdiction of the court.—*Pennoyer v. Neff*, 95 U. S. 714. The valid proceedings in the courts of one State must be given the same validity in other States as they would have in the State in which rendered. But it is always competent to show that the proceedings were not valid, as that the court did not have jurisdiction of the subject matter, or the parties to the suit. So anything that goes to the release or discharge of the judgment may be shown, as the statute of limitations.

Congress has provided by law that the public acts of States or Territories shall be authenticated by affixing to them the seal of such State or Territory, and the judicial proceedings of the various courts are authenticated by the seal of the court with the attestation of the clerk, and a certificate from the judge or magistrate that the attestation is in due form.—Rev. Stat. U. S., Sec. 905.

Section 2. Privileges of Citizens, etc.

Cl. 1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

Cl. 2. A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

Cl. 3. No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.*

Sec. 194. PRIVILEGES AND IMMUNITIES OF CITIZENS.—The privileges secured to citizens by this clause have never been fully enumerated by the courts. They do not extend to political privileges as the franchise and the holding of office; these are conferred by the State upon its permanent citizens. They do extend to the protection of life, liberty and property; to enable a citizen to pass through or reside in any other State, to bring suits in the courts of such State, to take hold and dispose of property, etc.—*Corfield v. Coryell*, 4 Wash. C. C. 371. The citizens intended are citizens of the United States, and the provision has no application to non-naturalized persons, or, previous to the Fourteenth Amendment, to free colored people.—*Scott v. Sanford*, 14 How. 393. Neither does the clause apply to corporations, as only natural citizens are intended.—*Paul v. Virginia*, 8 Wall. 168; *Cooley*, Principles, 207.

Sec. 195. EXTRADITION OF CRIMINALS.—The offenses for which a person may be extradited include statutory crimes of recent creation as well as those existing at the adoption of the Constitution. But just where the line is drawn between crimes and misde-

*This clause referred to fugitive slaves, and is now abrogated.

means of slight importance is uncertain.—*Kentucky v. Dennison*, 24 How. 66; *Taylor v. Taintor*, 16 Wall. 366. The Constitution intends the duty of extradition to be absolute, providing, first, that the demand is in the required form; second, the charge has been made in legal form before a court of competent jurisdiction; and, third, the defendant has actually fled from the State demanding his extradition.—*Von Holst*, Const. Law, 245. But should the executive of the State refuse to give up a person so demanded the Supreme Court has held that it cannot compel the performance of the duty.—*Kentucky v. Dennison*, *supra*.

Section 3. New States and Territories.

CL. 1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of the Congress.

CL. 2. The Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.

Sec. 196. NEW STATES.—Congress may admit new States, but is not compelled to admit them. *Von Holst* asserts that the evident intention of the authors of the Constitution in this clause was to provide for the States which were to develop from the territorial domain of the Union, and that in organizing Territories Congress “has always aimed, not to act from the stand-

point of colonial administration, but, on the contrary, to ascertain the life forms adapted to an embryonic State."—Const. Law, 185-6. But States have been admitted into the Union which were not part of the territorial domain, as in the case of Texas, which was an independent State. Congress may also impose restrictions upon States seeking admission to the Union. Cooley, Principles, 192-3. The Hawaiian Islands were annexed in the same manner as Texas, namely, by a resolution passed by Congress, but in the case of the Islands there was no intention of making them a State in the Union.

Clause two of this section gives the Congress power to make needful rules and regulations for the territory belonging to the United States. There was much dispute in regard to this power in the days of slavery.—Von Holst, Const. Law, 176-9.

Section 4. Guarantee to the States.

The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and, on the application of the Legislature, or of the executive (when the Legislature cannot be convened), against domestic violence.

Sec. 197. REPUBLICAN GOVERNMENT.—The United States are obligated to the States as respects securing and maintaining republican governments in the States. It is construed to be the power of Congress to determine finally in regard to when this guarantee is fulfilled, and the other departments must acquiesce in its decision.—Luther v. Borden, 7 How.

1, 42. The republican government of the States may be threatened by conquest from without; by revolution of the people against the constituted government, or by adopting some other form of government under the power of revising their constitution, which would not be republican in form. In these cases, Judge Cooley says, it would be the duty of the federal government to protect the existing government by the employment of the military force.—Principles, 215; *Texas v. White*, 7 Wall. 700. A republican government as intended by this clause cannot be definitely defined; it differs from a monarchy, and from an aristocracy, but not necessarily from a democracy, as, in its shortest description, it was to approach a government of, for, and by the people.

Sec. 198. PROTECTION AGAINST DOMESTIC VIOLENCE.—Upon demand of the legislature or of the executive of the State the federal government is bound to protect the States against domestic violence. The provision as to a demand on the part of the State is to exclude the federal authorities from State matters unless there is urgent need. But the federal property and interests within a State may be protected without demand from the States. Whether there exists domestic violence warranting the use of troops is a question of fact for the President to decide, and there is no appeal from his decision.—*Martin v. Mott*, 12 Wheat. 29.

ARTICLE V.

Power of Amendment.

The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress; provided, that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

Sec. 199. MODE OF AMENDING THE CONSTITUTION.—The above article is self-explanatory. The amendments adopted so far have been proposed by Congress. All amendments must be ratified by three-fourths of the States, and in case an amendment should seek to change the equal suffrage in the Senate, all the States should ratify it. For tacit amendment, and additions to the Constitution by construction, see Cooley, *Principles*, 8d ed., 89-40; Bryce, *Am. Commonwealth*, Vol. I., Ch. 81.

ARTICLE VI.

Public Debts, etc.

Cl. 1. All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the Confederation.

Cl. 2. This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Cl. 3. The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

Sec. 200. PUBLIC DEBT, SUPREMACY OF THE CONSTITUTION, ETC.—By clause 1 of this Article the debts of the Confederation which was replaced by the Union are recognized as binding. Clause 2 declares the federal constitution and laws and treaties made thereunder the supreme law of the land. This provision it is that establishes the federal government as a workable system. It is binding on the States as well as on individuals.—*Dodge v. Woolsey*, 18 How. 331.

State and federal officers are required to take an oath or affirmation to support the Constitution; this is proper, as it is the supreme law of the land. But no religious test shall ever be required as a qualification to office under the United States. Von Holst well observes: "The United States are not legally a Christian state; they are not even a theistic state; but just as little are they a pagan state. They are simply a state. The religious convictions of the people and the churches

as communities of believers, do not exist, so far as the United States are concerned, i. e., all these things lie without their sphere of action.”—Const. Law, 226.

ARTICLE VII.

Ratification of the Constitution.

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.*

*This clause is followed by the signatures of the members of the Convention by States. Among these men were Washington, Franklin, Hamilton, James Wilson, James Madison, etc., the most able and experienced statesmen of the time.

CHAPTER IX.

AMENDMENTS TO THE CONSTITUTION.

Sec. 201. **THE AMENDMENTS.**—The fifteen Amendments so far adopted were proposed by Congress, and ratified by the legislatures of the several States in pursuance of the fifth Article of the Constitution. Being later in time they supersede and alter the original Constitution in all respects where inconsistent with it. The first ten Amendments were proposed and adopted soon after the Constitution, and specifically limit the Congress of the United States and guarantee the fundamental rights of the people; these are known as the American Bill of Rights. The last three impose restrictions on the States in dealing with the negroes.*

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

*“The first ten amendments and the last three naturally arrange themselves in two classes, each of which, by its subject-matter and purpose, is distinctively referable to a particular period in the constitutional history of the country. One class consists of those which impose limitations on the power of the several departments of the federal government, with a view more completely to protect the liberties of the people and the

Sec. 202. FREEDOM OF RELIGION, OF SPEECH, AND OF THE PRESS.—The religious liberty as guaranteed by the Constitution does not extend to forbid the punishment of crimes because their commission may be believed to be a religious duty. So where the statutes forbid bigamy, and the defendant admits a second marriage and attempts to justify on the ground of religious belief, the court has held that polygamy being a crime no religious belief can be an excuse for it, as otherwise the religion would become the supreme law of the land.—*Reynolds v. United States*, 98 U. S. 145. And where a State statute forbade the members of an organization which practiced polygamy the franchise, the court upheld the statute on the ground that the protection of religious belief does not extend to permit crime under the guise of religion to subvert the good order and general peace of society.—*Davis v. Beason*, 133 U. S. 833.

Freedom of speech and of the press mean the same thing as respects the extent of the privilege guaranteed. "It is plain that the language of this amendment imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatever, without any prior restraint, so always

reserved rights of the States; and the other is confined in the main to taking from the States the power to oppress particular classes of the people, to discriminate unjustly between classes, and to take away such rights as are fundamental. The first ten belong to one class and the last three to the other." Cooley, *Principles*, Ch. XII.

that he does not injure any person in his rights, person, property or reputation, and so always that he does not thereby disturb the public peace, or attempt to subvert the government.”—2 Story Const., Sec. 1880. In *Cincinnati Gazette Co. v. Timberlake*, 10 Ohio St. 548, it is stated “that the liberty of the press, properly understood, is not inconsistent with the protection due to private character. It has been well defined as the right to publish, with impunity, the truth, with good motives and for justifiable ends, whether it respects government, magistracy, or individuals.” There can be no censorship of articles previous to publication. See 4 Bl. Com., 151; Cooley, Principles, Ch. 14; Const. Lim., 6th ed., 518.

ARTICLE II.

A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

Sec. 208. THE RIGHT TO KEEP AND BEAR ARMS.—The provisions of Articles 2 and 8 were intended to protect the people from arbitrary action on the part of government similar to that of the English government in the past. The right of the people to bear arms was a practical recognition of their right to demand with force that the government as constituted observe Constitutional restraints. The right

is general and extends to all citizens, whether enrolled in the militia or not. But it is held that it does not authorize the carrying of weapons that are concealed, and which are chiefly useful in individual encounters.—Cooley, Principles, 8d ed., 299.

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

Sec. 204. SEARCH WARRANTS.—The above clause restricts the use of search warrants to a reasonable compass; the officer must be kept within the terms of the writ, and goods seized must be taken before the court. The search warrant cannot be used to secure evidence of intended crime, and not generally to secure evidence against a person accused of crime.—United States v. Boyd, 116 U. S. 616. And a compulsory production of papers for the purpose of establishing a criminal charge, or the forfeiture of property, violates both the fourth and fifth amendments.—United States v. Boyd, *supra*.

ARTICLE V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in active service in time of war or public danger; nor shall any person be subject for the same offense to

be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Sec. 205. TRIAL FOR CRIME, ETC.—Infamous offenses include all such as are punished by imprisonment in the penitentiary, whether the sentence includes hard labor or not. They involve moral turpitude in the offender, or infamy in the punishment, or both.—*United States v. De Walt*, 128 U. S. 393; *Ex parte Wilson*, 114 U. S. 417. The possibility of being subjected to such a sentence is the test and not the sentence. The same offense means the same criminal act. A man is in jeopardy when put on trial, upon a good indictment and before a competent court when the jury is impanelled and sworn. But the jeopardy fails if the jury disagree, or if the case is stopped by the sickness or death of the judge or a juror.—*United States v. Boyd*, *supra*; *Boswell v. State*, 111 Ind. 47; *Cooley*, *Const. Lim.*, 6th ed., 899.

The accused may be a witness in his own behalf if he wishes. By due process of law is meant the various securities which the Constitution and the common law guarantee to the accused.

ARTICLE VI.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Sec. 206. RIGHTS OF ACCUSED PERSONS.

—The right to a speedy trial means that the trial shall not be delayed longer than is reasonably necessary for the prosecution to prepare for trial. The general public or the friends of the accused are to be admitted to the trial to insure fairness and impartiality. The indictment must set forth with reasonable particularity all the essentials of the offense. The right to be confronted with witnesses does not exclude the admission of documentary evidence to establish collateral facts.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

Sec 207. JURY TRIAL IN CIVIL SUITS.—

In suits at common law, that is, as distinguished from suits in equity, a jury trial is preserved. The jury meant is the common law jury of twelve men.—*Thompson v. Utah*, 170 U. S. 848; *Cooley*, Principles, 8d ed., 821.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Sec. 208. BAIL AND PUNISHMENT.—The amount of bail required in the different cases is usually within the discretion of the court. In capital offenses the accused is not generally admitted to bail. What punishments are unusual and cruel cannot be definitely stated. Electrocution has been decided not to be cruel or unusual within this prohibition.—*People v. Durston*, 119 N. Y. 569.

Sec. 209. FEDERAL LIMITATIONS.—The first eight amendments are limitations on the departments of the federal government and not on the States. Under the rule previously mentioned, that the provisions of the Constitution only refer to the States where they are expressly mentioned, these amendments are held to give the individual no similar immunities or guaranties from the action of the States.—*In re Kemmler*, 136 U. S. 436; *Von Holst*, Const. Law, 50 n.

ARTICLE IX.

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

The powers not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

Sec. 210. RESERVED POWER.—By Articles 9 and 10 the sovereign people assert their reserve power in all matters not granted to the federal government or to the States. Whether the people of the United

States or the people of the States is meant, is in dispute. We think that the wording would include both the people of the States and the people of the United States, as the powers retained are respectively State or National. See Von Holst, Const. Law, 51 n.

ARTICLE XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.*

ARTICLE XII.

Cl. 1. The electors shall meet in their respective States, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, which list they shall sign and certify, and transmit, sealed, to the seat of government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately by ballot the President. But in choosing the President, the votes shall be taken by States, the representation from

*See ante, Section 185.

each State having one vote. A quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President.

Cl. 2. The person having the greatest number of votes as Vice President shall be the Vice President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice President. A quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice.

Cl. 3. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.**

ARTICLE XIII.

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Sec. 2. Congress shall have power to enforce this article by appropriate legislation.

Sec. 211. **SLAVERY ABOLISHED.**—The above article abolishing slavery was proclaimed a part of the Constitution December 18, 1865. The former slave States were compelled to ratify this amendment as a condition precedent to their re-admission to State-

**The amended method of electing President and Vice President was considered in Chapter VI., Section 177.

hood. It puts an end forever to the vexed question of human slavery, which had been a blot on the national escutcheon for many years.

ARTICLE XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male members of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officers of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress

may, by a vote of two-thirds of each house, remove such disability.

Sec. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Sec. 5. The Congress shall have power to enforce by appropriate legislation the provisions of this article.

Sec. 212. UNITED STATES CITIZENSHIP.
—Previous to the adoption of the fourteenth amendment the Constitutional provision in regard to citizenship was embraced in Article IV., Section 2, of the Constitution, and under it Calhoun and his school claimed that there was no national citizenship, as the clause referred exclusively to State citizenship. The fourteenth amendment, seeking to protect emancipated negroes from hostile State legislation, defines and specifies what shall constitute national citizenship. All persons born or naturalized “in” the United States are possessed of a dual citizenship,—State and National. The States are forbidden to make any law which shall abridge the privileges or immunities of citizens of the United States. This limitation put upon the States is construed to extend to only those fundamental rights which Justice Washington had enumerated as protected by Article IV., Section 2, of the Constitution.—*Corfield v. Coryell*, 4 Wash. C. C. 371; ante., Sec. 194.

And this amendment does not change the nature of the relation between the States and the United States. It is the privileges and immunities of United States citizenship that are protected, and these are not as broad as the privileges of State citizenship. By construction the fourteenth amendment makes the negro a citizen of the United States, and of the State where he resides, but it does not subject the whole domain of civil rights to the controlling power of Congress, and does not change the federal character of the Union.—Slaughter House Cases, 16 Wall. 36; *Strader v. W. Va.*, 100 U. S. 308; *Williams v. Mississippi*, 170 U. S. 218; *U. S. v. Reese*, 92 U. S. 214.

Colored men as well as other classes of citizens are protected from discrimination or arbitrary interference with their fundamental rights on the part of a State, but this amendment does not require that every person in the land be extended the same rights and privileges as every other person.—*Barber v. Connolly*, 113 U. S. 27; *New York v. Squire*, 145 U. S. 175. See Cooley, *Principles*, Ch. 18.

Section 2 of this amendment was directed mainly against the former slave States, to compel them by a threatened reduction of representation to grant the suffrage to negroes. The provision has never been enforced. Mississippi, in 1890, adopted a Constitution in which an educational qualification is established for voters, shutting out a large number of illiterate blacks. South Carolina and Louisiana have similar qualifica-

tions. These qualifications will doubtless be upheld.—*Williams v. Mississippi*, 170 U. S. 218.

ARTICLE XV.

Section 1. The right of the citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color or previous condition of servitude.

Sec. 2. The Congress shall have power to enforce by appropriate legislation the provisions of this article.

Sec. 218. SUFFRAGE.—It is popularly believed that the thirteenth amendment freed the negroes, the fourteenth made them citizens and the fifteenth gave them the right to vote. The last part of this statement is incorrect. The fifteenth amendment gives no one the right to vote, it merely makes it impossible to withhold the franchise from a citizen on account of his race, color, or previous condition of servitude. On any other ground the suffrage may be withheld from white or black citizens as the political policy of the State or nation may determine. Women are not permitted to vote, and by an educational qualification the various States may restrict and limit to a considerable extent the persons who may vote and yet the provisions of this amendment would not be violated.—*Gougar v. Timberlake*, 37 N. E. Rep. 644; *Von Holst*, Const. Law, 75.

It is best, we think, that the amendments which were adopted in haste, and reluctantly accepted by a portion of the Union, should have been construed as they have been,—mildly. Four judges of the nine who decided

the Slaughter House Cases favored construing the amendments as making a change in the fundamental nature of the Union, making it in fact a centralized State. A wiser opinion prevailed, and though for a time the illiterate element of our population may be discriminated against in the matter of voting, this will be remedied by the spread of education. For the few instances where there has been this tendency to limit the franchise we may note a dozen instances where States are ready to extend to their citizens the initiative and referendum—the right to make or unmake the laws by popular vote. It is fitting that we conclude this summary of our Constitution with an allusion to the ever-growing respect for popular government.

CHAPTER X.

STATE CONSTITUTIONS AND GOVERNMENT.

Sec. 214. **THE STATES.**—As a result of the Revolution thirteen States or Colonies secured their independence and later established the federal government which we have been considering. But from the first the people of these States have retained and perfected their political organization within the State for the control of all matters not delegated to the government of the Union. While the struggle for independence was going forward all of the original States save Rhode Island and Connecticut drew up written Constitutions, establishing the frame work of republican government. From the territory belonging to these States and ceded by them to the Union, and from other territory purchased or secured by treaty, additional States have been formed and admitted, until at present there are forty-five States in the Union. The government in each of the States is based upon a written Constitution, which is the fundamental law of the State. These Constitutions have been adopted by the people of the States after being formulated in conventions chosen for the purpose. In each of the States as well as in the Federal Union, the people are recognized as the possessors of all sovereignty, and all

authoritative acts within a State must be in accordance with their expressed will.*

Sec. 215. MAKEUP OF THE CONSTITUTIONS.—The State Constitutions usually consist of a bill of rights, the frame of government or distribution of political power, and a schedule providing for the necessary steps in changing from the old to the new government. The schedule being of temporary importance is not found in all Constitutions.†

The bill of rights usually contains those fundamental rights which we have described as being gleaned from the English charters, and which are found in the federal Constitution. They aim to protect the citizen in his life, liberty and property against arbitrary government, secure him a speedy and impartial jury trial, etc.

*“All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

“All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.” Ohio Const. (1851), Art. I., Secs. 1 and 2, Bill of Rights.

†Two additional parts of State Constitutions are sometimes given, as (a) description of the State's boundaries, (b) miscellaneous provisions concerning which the people have expressed their will. Bryce, *Am. Com.*, Vol. I., p. 437, Am. ed.

The enumeration of certain rights of the citizen which are to be protected does not deny that the citizen has other fundamental rights not enumerated.—Von Holst, *Const. Law*, 267.

The State Constitutions establish republican governments and in them the separation of the three departments, executive, legislative and judicial, is as complete as in the federal government. The Constitutions also specify who shall exercise the right of suffrage, and recognize the existence of local self-government.

Sec. 216. THE LEGISLATURES.—In all of the States the bicameral legislative system prevails, that is, the legislature is composed of two houses. The more numerous branch is called the assembly or house of representatives, and the other branch is called the senate. The two houses together form the "general assembly," or State legislature. Both branches of the legislature are elected directly by the people, the State being apportioned by law into districts according to population, the senatorial districts being larger than the districts in which representatives are elected.*

State senators are usually elected for a term twice

*Minority Representation. In Illinois, by the Constitution of 1870, it is provided that the representatives shall be elected in the senatorial districts, each district being entitled to three representatives. It is further provided that each voter may, instead of voting for three representatives, cast his three votes for a single candidate. By this means a minority party may secure representation in the legislature.

that of representatives. The rule is four and two years, but in some of the States the term is two and one respectively. In most States the senators are classified so that all do not go out of office at the same time. In some of the States the legislature meets annually, in others only biennially. The legislature may also be called in extra session. The members of the legislature are paid a salary, either per diem, or an annual salary. The sentiment is growing that biennial sessions are sufficient for all the necessary ends of government, and that annual sessions simply result in littering the statute books with laws in the interests of certain enterprises or monopolies whose exploitation with legislative sanction is destructive of the true ends of popular government. See Von Holst, *Const. Law*, 270-1.

Sec. 217. LEGISLATIVE POWERS.—In treating the powers of Congress we saw that the federal Constitution was a grant of power to the departments as well as the authority which distributed the powers granted between the departments of government. Congress, we learned, had only the powers granted to it or necessarily implied to make those granted effective. The State legislatures are not so limited, and the State Constitutions, instead of granting, simply apportion the powers reserved in the States, so that the legislature possesses all power not granted to the federal government, or specifically denied by the State Constitution, or impliedly denied by the nature of our institutions and government.—Cooley, *Principles*, 3d ed., 386; *Const, Lim.*, 6th ed., 106-7.

The legislative authority in the States is more minutely regulated in its exercise than that of Congress. In a number of Constitutions it is provided that no bill or law shall contain more than one subject, which shall be clearly expressed in its title. The provision for oral reading of bills on three separate days is found in most of the Constitutions, and in several it is provided that a majority of all the members elected is necessary to the passage of a bill. Various expedients, as roll call and viva voce voting, are resorted to in a number of the States to fix the responsibility of individual members to their constituents. The judicial power of the legislature is limited in a number of the States, and they are forbidden to grant divorces. Most of the Constitutions of recent date recognize the temptation which the people's delegates are subjected to from individuals and corporations seeking to get special privileges from the law-makers, and provide that the granting of corporate franchises shall be by general laws.* And the power to pledge the credit of the State or use its funds for the benefit of private corporations is generally denied or carefully limited. All of these regulations result from the growing distrust of legislative bodies, who justly merit this distrust and seemingly seize every opportunity to demonstrate to their constituents the

*"The general assembly shall pass no special act conferring corporate powers.

"Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed." Ohio Const., Art. XIII., Secs. 1 and 2.

need of further restrictions and checks upon their power.†

Sec. 218. LIMITATION OF THE STATE'S ACTIVITY.—In nearly all of the States at present there is a tendency to limit the sphere of governmental activity to those things which are necessary to make, administer and execute the laws, and to avoid alike internal improvements and the operation and control of public utilities, as the railroads, canals, bridges, telephones, telegraphs, etc. The apprehension of evil from two sources has been the cause of this shirking of evident duty on the part of the States, which guarantee their citizens the right to life, liberty, and happiness, and take no adequate measures to protect citizens in any of these inalienable rights. A fear that unscrupulous individuals would fill their pockets from the public

†“Some unthinking individuals point to the dishonesty of legislative bodies, as they are constituted at present, as evidence of the inherent weakness of popular government, and the inability of the people to rule themselves. A moment's reflection will show the foolishness of such an assumption. When a State comprising five or six millions of people is ruled by a body of several hundred corporation attorneys, plus a few brewery agents and municipal parasites, and is consequently misgoverned, it is not popular government that is at fault. Such a system is not popular government. Legislative corruption simply proves that plutocracy has prostituted the system which an ever trustful people believed would suffice to secure equal and just laws. It is now necessary by the further expedients of the Initiative and Referendum to bring the salutary influence of the rank and file of the citizens to counteract and nullify the corruptive and destructive tendencies of the plutocratic trusts and monopolies.

revenues if these industrial enterprises were included in the sphere of government, and that the government becoming more powerful would grow arbitrary and tyrannical as the governments of the past, has been responsible for the limitation of governmental functions in America. We must admit that these apprehensions are not unfounded, unless at the same time that the sphere of government is enlarged, new checks for keeping it within the control of the majority are devised. But these checks are being devised from time to time, and the only escape from such corporate monopoly of wealth and industry as will deprive the great majority of the people of all semblance of liberty and happiness is for the State to widen its sphere of action, and control, if not operate, all the agencies in which the general public are interested, and the occupations which may control the common necessities of life. We believe the sentiment of the people is changing on this subject, and as soon as the proper safeguards are established for keeping the government in the hands of the people the sphere of governmental activity will be enlarged as the present condition of affairs seems to demand.

Sec. 219. **THE STATE EXECUTIVE DEPARTMENT.**—The function of the executive department in the States, as well as in the federal government, is to take care that the laws are faithfully executed. The chief executive officer is styled the governor. The qualifications for this office vary slightly in the different States, but are chiefly to the three points, citizenship, age, and residence in the State. The gov-

ernor is elected by the voters of the State; the term of office varies in the several States, ranging from one to four years. In a few States the governor is not eligible to immediate re-election. In most States a lieutenant governor is elected at the same time and for the same term as the governor; he is presiding officer over the Senate, but without a vote, and succeeds the governor in case of a vacancy in that office.

Sec. 220. POWERS AND DUTIES OF THE GOVERNOR.—The function of the governor correspond to that of the President; he represents the State in its relation to other States, enforces the laws, is commander-in-chief of the militia of the State, and may call it out to enforce the laws or put down an insurrection. He is aided and advised by the other executive officers of the State. It is his duty to inform the legislature at each session of the condition of the State, and he may convene the legislature in special session when he deems it necessary. In most of the States the governor has a qualified veto, on the legislature, but in each instance a sufficient majority can pass a bill over his veto. The governor has power to grant pardons, except in cases of impeachment. His power of appointing other officers is not nearly so extensive as that of the President, as the more important State officers are elected.

Sec. 221. ASSISTANT EXECUTIVE OFFICERS.—In each of the States there are some or all of the following officers, who have under the Constitution an independent share in the executive function; a sec-

retary of State, an auditor or comptroller, treasurer, attorney general, superintendent of schools, surveyor general, State printer and State librarian. These officers in most States are elected by the voters of the State; in some instances they are elected by the legislature, and in others part are appointed and part elected. They do not unite with the governor to form an executive unit, or cabinet; but each has duties to perform and is responsible to the people for the proper exercise of his office. In North Carolina a number of these officers, under the Constitution of 1868, formed a "council of state" to advise the governor in the execution of his office. See Von Holst, *Const. Law*, 289n.

Sec. 222. THE STATE JUDICIARY.—The judicial power of the States is vested in a number of courts which are graded from a single Supreme Court, to a large number of inferior courts of limited jurisdiction. There is considerable diversity in the various States in the names of the courts and the jurisdiction granted them.* The following is a general summary of the courts usually found in the States: 1. A Supreme Court, consisting of from three to five judges, with original jurisdiction in a few instances, and appellate jurisdiction from the next lower courts. 2. Circuit Courts, varying in number, possessing some original jurisdiction and with appellate jurisdiction from the

*The judicial department as organized in each State can be studied by the student from the Constitution and statutes of the State, which may be found in the office of any attorney.

next lower courts. 8. Common Pleas Courts, which are held in each county several times during the year, with general jurisdiction and power of reviewing the action of the lowest courts. 4. Justices Courts; these latter are the lowest in the scale of jurisdiction and are limited to the trial of civil cases, in which but small amounts are involved, or where petty misdemeanors have been committed. 5. Probate Courts; these exist as county courts for hearing probate and testamentary matters; in some States they are called Orphans' Courts.

In the Code States all distinctions between common law and equity have been abolished, and the same courts that hear common law cases also hear and determine cases which demand so-called equitable relief. In the States which have not reformed their practice, courts of equity or chancery jurisdiction exist for the determining of cases necessitating equitable relief. The jurisdiction of these courts is determined by the rules of chancery law, and the method of procedure is quite distinct from that at law.

The Judges of the various State courts are as a rule elected by the voters of the State or district and hold for a term of years fixed by law. They are subject to impeachment the same as other civil officers, the judges of the higher courts receiving a salary, and justices of the peace being compensated by fees received and taxed as costs in each case.

Sec. 228. MINOR CIVIL DIVISIONS AND SELF-GOVERNMENT.—Every State is divided

into counties (in Louisiana called parishes), and each county is divided into towns or townships. The origin of these minor civil divisions may be traced to the manner in which our country was settled. Small settlements united with others for protection, but reserved the exclusive management of all local matters. Thus from self-governing communities, States were formed, and the sovereign States in turn united to form the Federal Union. In this process of centralization regard was ever paid to the rights of the smallest local unit, and the right of the people to manage locally the matters which concern them alone has never been questioned.

In each county officers are elected by the voters of the county for carrying on the affairs of the county, as well as such matters pertaining to the State at large as must be conducted within the territory embraced by the county. These include, a board of commissioners, or supervisors, treasurer, recorder, sheriff, prosecuting or district attorney, coroner, surveyor, school superintendent, assessors and collectors of taxes. Some of these officers, though elected within the county, represent the State in exercising their office, while others simply represent the county.

Sec. 224. SAME SUBJECT—TOWNSHIPS.
—Following out the policy of local self-government, officers are elected in each township to conduct the affairs of the State therein, and such local matters of government as demand the attention of the people. These officers are usually denominated as follows:

Township trustees or selectmen, treasurer, clerk, supervisor of roads, overseers of the poor, constables, assessors and collectors of taxes.

Sec. 225. MUNICIPAL CORPORATIONS.—

The people in the cities and villages of the States are either by general laws, or special grants, incorporated, that is, conjoined, and given a legal unity for certain purposes connected with their local government. Cities, villages, counties and townships as incorporations are called municipal or public corporations to distinguish them from corporations organized for business purposes. The grant of powers to incorporated cities and villages may include a vast range of powers, and establish almost a separate government. But the inhabitants are still subject to the general laws of the State, and the corporation may not exceed any of the powers granted it, and is ever subject to the paramount will of the State legislature, which, having granted the special power, has a like privilege of withdrawing it.

Sec. 226. TAXATION.—The State government, as well as the Federal government, possesses the power of levying taxes upon the property or persons of its citizens or subjects. The taxing power of the State and Federal government is concurrent, and each may levy its exactions upon the same person or property. But the perpetuity of an indissoluble union of indestructible States prevents either government from taxing the agencies or properties of the other, and the States are further forbidden to tax imports. So far the federal revenues have been derived chiefly from duties laid on

imported articles, and on the manufacture and sale of tobaccoes and liquor, and in cases of greater necessity income and stamp taxes have been levied. The States have relied for their revenues upon taxes laid on the value of property. Both real and personal property are taxed, and every description of tangible and intangible property is sought to be reached. In many States the law provides for returns to be made by each citizen possessing property, stating under oath the kinds and values of his properties, and upon these returns, or the estimates of elected assessors, the taxes which each citizen is to pay is determined. Personal property where of small value is commonly exempted, and the properties of schools, churches, charitable institutions, etc., as well as all public property, are exempted from taxation. The collection of the assessed taxes is enforced by sale of the property, against which there is no exemption.

Sec. 227. EDUCATION.—In a country which recognizes the political equality of its citizens and aims to make the male portion of them participators in the government on attaining the age of majority, it is self-evident that the maintenance of a system of schools for the education of the coming citizens is a proper function of government. So far the extent to which the education of children in the free schools of the States has been carried has been quite limited. In the rural districts the common schools are usually ungraded and nothing but the primary branches are taught. In towns and cities the public schools are graded, and

grammar and high school advantages are offered. In some of the States the books are furnished free, but in the majority the instruction alone is free. Normal schools have been established in a number of States for the better preparation of teachers for the common schools. These are assisted by the State, but in most instances a nominal charge is made for the instruction given.

The schools are supported by taxation and also by the proceeds from the funds which were given to each State by the federal government, and from the grants of public lands by the federal government for educational purposes. See Von Holst, *Const. Law*, 804-806.

Higher education is provided for in the States by establishing colleges and universities, which are supported in part by the State. Religious instruction is uniformly excluded from all public schools, from the lowest to the highest.—Von Holst, *Const. Hist.*, IV., 91.

Sec. 228. PUBLIC INSTITUTIONS.—The State in protecting life and property and promoting the general welfare undertakes to provide for the incapable human beings who, by reason of disease or physical infirmities, are unable to care for and provide for themselves. It also provides for the incarceration of those who have committed crimes and forfeited their right to personal liberty. In taking care of these two classes of persons each State establishes and maintains charitable and penal institutions.

In a few States there exist public improvements

which are owned and controlled by the State, such as canals and turnpikes. The ownership and management of these public utilities by the State has proven a great benefit to the people in furnishing ready and cheap transportation, and keeping these agencies open to the people without paying tribute to some private monopoly. It is now only a question of years until all so-called natural monopolies will have to be owned and operated by the State.

Sec. 229. POLICE POWER OF THE STATE.

—It is within the province of government to preserve order, punish offenses, make regulations for the use and management of property that each may enjoy his own without infringing the rights of others, and the authority under which all these internal rules and regulations for the peace and well-being of society are made is called the police power of the State. To prevent conflict of rights between man and man wherever or in whatever form they may arise is the duty of the sovereign power, and this branch of sovereignty is commonly called the police power.—*License Cases*, 5 How. 504; *Munn v. Illinois*, 94 U. S. 118.

The police power is the most comprehensive portion of sovereignty, it extends “to every person, every public and private right, everything in the nature of property, every relation in the State, in society, and in private life. The use of public highways is regulated under it; so are the public fisheries and mines, if any, and so are all the occupations of life. The domestic relations are formed, regulated, sustained, and dissolved

under the rules it prescribes; the age at which a child becomes emancipated, the terms under which he may be allowed to apprentice himself or be forced by the public authorities to do so, and the measure of independent action in the marriage relation, are all determined by its rules. These rules seldom raise any question of constitutional authority, but it is possible for them to be pushed to an extreme that shall deny just liberty."—Cooley, *Principles*, 3d ed., 250-1; *Commonwealth v. Alger*, 7 Cush. (Mass.) 53; *Lawton v. Steele*, 152 U. S. 188.

The federal Constitution grants no police power to the general government, so that the power remains intact in the State, subject always to the prohibitions contained in the federal Constitution as regards *ex post facto* laws, the impairment of contracts, etc.

Sec. 280. SAME SUBJECT—TRADES AND OCCUPATIONS.—Every citizen has the right to engage in lawful business, and to choose the profession or business he will follow, but to a reasonable extent the State may regulate all trades and occupations. And in cases it is held that this power extends to prohibit callings considered injurious to the general public.—40 Ind. 812; 10 Mo. 591. The police power extends to prevent persons of one sex from engaging in occupations licensed by the State, as to forbid the employment of females in saloons. And the State may forbid persons under a certain age from engaging in a lawful occupation, as the employment of child labor, in fac-

tories; and may regulate the number of hours per week which certain classes of persons may be employed.

Professions requiring special skill and training, and in which an unskilled person might cause damage and injury, are commonly regulated by the State. Thus the practice of law and medicine is limited in most States to those who, by a course of study and training evidenced by a diploma or ability to pass a prescribed examination, have fitted themselves to engage in these callings. The State may not discriminate in prescribing qualifications in favor of a particular school of medicine.

The police power has been extended to regulate the sales of dangerous, poisonous or explosive articles; to require the inspection of bread, flour, meat and other articles of general use.

Sec. 281. SAME SUBJECT—MONOPOLIES, TRUSTS, ETC.—At common law all combinations to raise prices by engrossing and controlling the whole supply of a commodity were held to be unlawful and criminal. The formation of trusts and monopolies were treated as conspiracies.—6 E. & Bl. 47; Law Reports, 2 Q. B. 193. These principles of the common law are clearly in force in the various States and are applicable to the numerous trusts and monopolies which are designed to throttle individual enterprises. And it is within the police power of the States to punish or prohibit all contracts or organizations intended to stifle competition and arbitrarily raise the price of commodities through the instrumentality of a trust or mo-

nopoly or otherwise.—*Texas & P. Ry. Co. v. Southern Pac. Ry. Co.*, 41 La. Ann. 970. In *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, it is held that a “corner” or a confederation to control the price of articles of commerce, or to raise or lower the price of stocks, is a conspiracy. So in the case of *The Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666, a combination of salt manufacturers to regulate the price and grade of salt, and forbidding each member to sell salt save at prices fixed by the company, was held illegal and void as in restraint of trade and against public policy.

The federal government, under its commerce power, has provided against carriers pooling freights, or dividing earnings and thus stifling competition; so by a recent decision of the Supreme Court the combination known as the Joint Traffic Association was declared void. And a federal law of 1890 declares all contracts, combinations or conspiracies in restraint of trade void, and makes it a misdemeanor to thus monopolize or attempt to control trade or commerce among the several States or with foreign nations.*

*It will be seen from the text that the State has full legal authority to control trusts and monopolies, and the courts could easily put an end to their devastating career by the application of well-known and long-established judicial precedents. It may well be asked: Why has this not been done? And why do these illegal combinations exist on all hands? The true answer to these questions is to be found in the fact that corporate wealth has found means to subvert or prevent the enforcement of the

At common law a combination to coerce an individual or company by refusing to work for, or to permit others to work for, such individual or company, commonly known as a boycott, is treated as a criminal conspiracy, for which the persons engaging therein may be indicted.—*Crump's Case*, 84 Va. 927. So all strikes and boycotts in which by violence, threats, or other coercive measures, the rights or property of others is endangered or trespassed upon, are promptly enjoined by the courts and the parties engaged therein are liable to indictment for criminal conspiracy.—*Rex v. Journeyman Tailors*, 8 Mod. 10; *State v. Donaldson*, 32 N. J. Law 151.

Sec. 232. SAME SUBJECT—REAL PROPERTY.—The possession of real property by the citizens of a State is ever subject to the right of the State

laws that might prove hostile to its ambitious career. That this is the true reason why monopoly has not been restrained appears from the fact that the counter organization of the laboring classes, who by means of strikes and boycotts have sought, contrary to law, to secure their rights, have been quickly and effectually squelched by the courts. The principle in each case is exactly the same, the monopoly, by the use of lawless wealth and in violation of law and right, seeks to corner public necessities; strikers and boycotters, by means of mob force, would take the law in their own hands and commit breaches of the peace to secure their demands. Criminal conspiracy, injunction, and the military power of the State is as applicable to the one as the other. Corporate wealth has tampered with the scales of blind justice, or law and right would as quickly control the piratical trust as it has done the lawless mob.

to take such portions of it as may be needed for the advancement of general welfare. The right of the State to take the property of citizens for public use is called the power of eminent domain. This power is not to be exercised arbitrarily, and is regulated by the Constitution, which usually provides the manner of taking, and that compensation shall be made.—Pollard's Lessee v. Hagan, 3 How. 212.*

Sec. 233. AMENDMENTS.—The State Constitutions provide the manner in which they may be amended or altered. They provide in every case that the amendment of the fundamental law shall be harder to accomplish than the enacting of an ordinary statute. Amendments after being adopted in convention or by the legislature are submitted to the people of the State to be ratified. In some States the Constitution provides that each twenty years the question, "Shall there be a convention to revise, alter, or amend the Constitution?" may be voted on by the electors of the State. This recognition of the power and right of the people to make over, from time to time, the fundamental law of their political organization, is the distinctive feature between free America and arbitrary, tyrannical Europe. Constitutions are never perfect. Government is a progressive science. The legislators of one era can at best but provide for the conditions in which they are placed.

*This subject, as well as that of personal and religious liberty under the police power, will be taken up more fully in the next number of the *Cyclopedia of Law*, under the subject of "Personal Rights."

The development of new forces and instrumentalities, as well as the change in social conditions, requires like changes and development in the governmental system. The trust confided to the people to manage their common interests has never, in all the ages, been betrayed. Only when, by fraud and force, a few individuals have set themselves up as the possessors of the sovereign power has government become a curse rather than a blessing.

Our political organizations are characterized by the many restraints or checks imposed upon the organs of government. As stated by an early statesman,* the States are balanced against the general government; the Senate is a check upon the House, and vice versa; the three departments of the federal government are balanced; the executive is balanced against the legislative department; the Senate is balanced against the executive by its control over appointments and treaties, etc. But the final and most important check is the control which the people have retained of electing the officers and agents who exercise governmental authority, and of amending, altering, or abolishing government, for the purpose of establishing others which more nearly satisfy their sovereign will.

Sec. 284. RULES OF CONSTRUCTION.—When the provisions of a Constitution are found to require construction in their application to concrete cases, the following rules are usually followed: 1. The mean-

*John Adams, Works, vi., 467.

ing of the Constitution is always the same, and the construction should be uniform. 2. The entire instrument is to be considered in construing any part, and effect is to be given to the whole as well as each part. 3. It is the intent of the sovereign will that is to govern and this is to be found in the instrument itself.—Cooley, *Const. Lim.*, 6th ed., 60; *Beardstown v. Virginia*, 76 Ill. 84. 4. A State Constitution is to be construed in the light of the common law, as the common law is regarded as being in existence prior to the Constitution and as remaining afterwards, limited by such restrictions as the Constitution imposes.—*State v. Noble*, 118 Ind. 350; *Mattox v. United States*, 156 U. S. 287. 5. The Constitutions as well as the statutes are considered as operating prospectively, and never retrospectively. 6. The grant of a general power carries by implication every special power necessary for its exercise. 7. When the terms of the Constitution cannot be made plain from a careful examination of the whole instrument, extrinsic aids may be resorted to, as a consideration of the object or purpose of the provision, the proceedings of the framers of the Constitution, and contemporaneous construction.—Cooley, *Principles*, 8d ed., 386-9; *United States v. Healy*, 160 U. S. 186; *Story, Const.*, Sec. 407.

Sec. 235. IN CONCLUSION.—In this chapter it has been taken for granted that the reader is an American citizen and acquainted more or less with the institutions of government which surround him, hence minute details have been avoided. Again, it is to be

understood that this being a student's, and not a practitioner's compendium, many technical matters have not been adverted to at all. The important principles of Constitutional Law have been gone over as fully as the plan of the work as a student's and citizen's handbook would permit.

HELPS TO STUDENTS.

As suggested in "How to Study Law," the title of the first number of the *Cyclopedia of Law*, a complete list of questions will be appended to each book of the series directing the attention of the student to the important points to be mastered. In the present number lists of questions given to graduating students of law colleges, and to students being examined for admission to the Ohio bar have been added. The purpose of these questions is to enable the student to judge if he has sufficient knowledge of the subject to pass the ordinary examination for admission to the bar.

In studying this subject we suggest that the student take up a single chapter at a time, having carefully read the chapter, examine the questions covering it and see that you have completely mastered all points. Where possible read other authorities and cases on the more important topics. When all the chapters have been thus considered, take a general review of the whole book, and then with some one to quiz you, take an oral examination on all the questions contained in this book. If your work has been reasonably thorough we will guarantee that you will be able to pass any fair bar examination on this subject.

Citations. A list of abbreviations used in citing authorities and cases is given in the front part of this book; these may usually be found in any law dictionary. Cases are cited by giving the names of the parties,

plaintiff and defendant, and the number of the volume, the name of the report or reporter, and the page on which the case begins, as *Martin v. Mott*, 12 Wheaton 19. Formerly the reports were named after the individual who compiled them, now in most States and in the United States the reports of the Supreme Court are State reports or United States reports.

In the study of leading cases, which should be done as much as your time and facilities will permit, the following plan will prove helpful: 1. Get the nature of the action. 2. The essential facts of the case, in brief form. 3. The point or points in dispute. 4. The decision, or holding of the court, in a single word. 5. The grounds of the decision, or the reasoning of the court. This method of studying and analyzing leading cases is one recommended by the distinguished and well-known author of legal books, Melville M. Bigelow.

If the student following this course intends to become a practitioner it would be well for him to visit the office of any local attorney and get permission to use occasionally such books as the Statutes of the State, or legal dictionaries. In most cases your local attorney will be pleased to assist you in any reasonable manner.

Of the many valuable text-books on the subject of Constitutional Law we have cited but a few in these pages. Reference to these or any others will be found helpful. Students of the *Cyclopedia of Law* are invited to write for any information they may require in this connection to the Principal, whose address will be found on another page.

APPENDIX I.

NATURALIZATION LAW.

Act of June 29, 1906, Ch. 3592. Establishing Bureau of Immigration and Naturalization.

SEC.

1. Department of commerce and labor; immigration and naturalization bureau; registry of alien immigrants; certificates of registry.
2. Additional offices, employes, etc.
3. Naturalization of aliens; courts given jurisdiction; restricted to residents of district; blank forms to be furnished.
4. Proceedings.
Declaration of intention; qualifications, etc.; previous declarations.
Petitions for citizenship certificates; requirements; previous declarations; declarations as to anarchy and polygamy; renunciation of other allegiance; intention of pertinent residence, etc.; evidence as to character, etc.; certificates of arrival and intention, to be filed.
Declaration in open court.
Evidence of residence, etc., required; additional testimony, former titles, etc., to be renounced.
Widows and minor children.
5. Public notice of petition, hearing, etc.; subpoenas to witnesses.
6. Filing and docketing; hearings; election day restriction; change of name.

SEC.

7. Naturalization forbidden to anarchists or polygamists.
8. Speaking English required; physical incapacity; not applicable to prior declarations; homestead entrymen.
9. Final hearings; record of orders, etc.
10. Evidence of residence.
11. Examinations, etc., in opposition.
12. Court to keep duplicates of declarations and certificates; papers in rejected cases; penalty for failure of clerk; responsibility for blanks; return of defaced, etc., blanks; penalty.
13. Fees; declaration; petition, certificate, etc. Disposal of fees; deposit by petitioner for expenses; retention by clerk; payment for additional clerks; additional allowance.
14. Binding of papers, etc.
15. Proceedings to cancel certificates illegally procured; notice to holder, etc.; canceling certificates of persons permanently abroad; copy of order of cancellation to bureau; to court of original issue; cancelling records, etc.; application to all certificates.

SEC.	SEC.
16. Punishment for issuing, etc., false certificates.	22. Punishment for issuing false acknowledgments, etc.
17. Punishment for engraving, printing, selling, etc., counterfeits.	23. Punishment for fraudulently obtaining naturalization; accessories.
18. Punishment for illegally issuing, etc., certificates.	24. Limit for prosecutions.
19. Punishment for unlawful possession of blank certificates.	25. Laws repealed.
20. Punishment for neglecting to render accounts, etc.	27. Forms, [omitted].
21. Punishment for receiving illegal fees.	28. Rules of evidence.
	29. Appropriation.
	30. Naturalization of persons owing allegiance, but not United States citizens.
	31. Effect of laws.

Act of June 29, 1906, Ch. 3593, 34 Stat. L. 596.

Sec. 1. [*Department of Commerce and Labor—Immigration and Naturalization Bureau—registry of alien immigrants—certificates of registry.*] That the designation of the Bureau of Immigration in the Department of Commerce and Labor is hereby changed to the "Bureau of Immigration and Naturalization," which said Bureau, under the direction and control of the Secretary of Commerce and Labor, in addition to the duties now provided by law, shall have charge of all matters concerning the naturalization of aliens. That it shall be the duty of the said Bureau to provide, for use at the various immigration stations throughout the United States, books of record wherein the commissioners of immigration shall cause a registry to be made in the case of each alien arriving in the United States from and after the passage of this Act of the name, age, occupation, personal description (including height, complexion, color of hair and eyes), the place of birth, the last residence, the intended place of residence in the

United States, and the date of arrival of said alien, and, if entered through a port, the name of the vessel in which he comes. And it shall be the duty of said commissioners of immigration to cause to be granted to such alien a certificate of such registry, with the particulars thereof. (84 Stat. L. 596.)

Sec. 2. [*Additional offices, employees, etc.*] That the Secretary of Commerce and Labor shall provide the said Bureau with such additional furnished offices within the city of Washington, such books of record and facilities, and such additional assistants, clerks, stenographers, typewriters, and other employees as may be necessary for the proper discharge of the duties imposed by this Act upon such Bureau, fixing the compensation of such additional employees until July first, nineteen hundred and seven, within the appropriations made for that purpose. (84 Stat. L. 596.)

Sec. 3. [*Naturalization of aliens—courts given jurisdiction—restricted to residents of district—blank forms to be furnished.*] That exclusive jurisdiction to naturalize aliens as citizens of the United States is hereby conferred upon the following specified courts: United States circuit and district courts now existing, or which may hereafter be established by Congress in any State, United States district courts for the Territories of Arizona, New Mexico, Oklahoma, Hawaii, and Alaska, the supreme court of the District of Columbia, and the United States courts for the Indian Territory; also all courts of record in any State or Territory now existing, or which may hereafter be created, having a

seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited. That the naturalization jurisdiction of all courts herein specified, State, Territorial, and Federal, shall extend only to aliens resident within the respective judicial districts of such courts. The courts herein specified shall, upon the requisition of the clerks of such courts, be furnished from time to time by the Bureau of Immigration and Naturalization with such blank forms as may be required in the naturalization of aliens, and all certificates of naturalization shall be consecutively numbered and printed on safety paper furnished by said Bureau. (34 Stat. L. 596.)

Sec. 4. [*Proceedings.*] That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise:

First. [*Declaration of intention—qualifications, etc.—previous declarations.*] He shall declare on oath before the clerk of any court authorized by this Act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state or sovereignty of which the alien may be at the time a citizen or subject. And such declaration shall set forth the name, age, occupation, personal description, place of birth, last for-

eign residence and allegiance, the date of arrival, the name of the vessel, if any, in which he came to the United States, and the present place of residence in the United States of said alien: Provided, however, That no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration.

Second. [*Petitions for citizenship certificates—requirements—previous declarations—declarations as to anarchy and polygamy—renunciation of other allegiance—intention of permanent residence, etc.—evidence as to character, etc.—certificates of arrival and intention, to be filed.*] Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting, and duly verified, in which petition such applicant shall state his full name, his place of residence (by street and number, if possible), his occupation, and if possible, the date and place of his birth; the place from which he emigrated, and the date and place of his arrival in the United States, and if he entered through a port, the name of the vessel on which he arrived; the time when and the place and name of the court where he declared his intention to become a citizen of the United States; if he is married he shall state the name of his wife and, if possible, the country of her nativity and her place of residence at the time of filing his petition, and if he has children, the name, date, and place

of birth and place of residence of each child living at the time of the filing of his petition: Provided, That if he has filed the petition in his own handwriting. The petition shall set forth that he is not a disbeliever in or opposed to organized government, or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government, a polygamist or believer in the practice of polygamy, and that it is his intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty and particularly by name to the prince, potentate, state or sovereignty, of which he at the time of filing of his petition may be a citizen of the United States, and, if denied, the ground or grounds of such denial, the court or courts in which such decision was rendered, and that the cause for such denial has since been cured or removed and every fact material to his naturalization and required to be proved upon the final hearing of his application. The petition shall also be verified by the affidavits of at least two credible witnesses, who are citizens of the United States, and who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the State, Territory, or district in which the application is made for a period of at least one year immediately preceding the date of filing of his petition, and that they each have personal knowledge that the petitioner is a person of good moral character,

and that he is in every way qualified, in their opinion, to be admitted as a citizen of the United States. At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Commerce and Labor, if the petitioner arrives in the United States after the passage of this Act, stating the date, place, and manner of his arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made part of said petition.

Third. [*Declaration in open court.*] He shall before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.

Fourth. [*Evidence of residence, etc., required—additional testimony.*] It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles

of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record.

Fifth. [*Former titles, etc., to be renounced.*] In the case the alien applying to be admitted to citizenship has borne any hereditary title, or has been of any of the orders of nobility in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility in the court to which his application is made, and his renunciation shall be recorded in the court.

Sixth. [*Widows and minor children.*] When any alien who has declared his intention to become a citizen of the United States dies before he is actually naturalized the widow and minor children of such alien may, by complying with the other provisions of this Act, be naturalized without making any declaration of intention. (34 Stat. L. 596.)

Sec. 5. [*Public notice of petition, hearing, etc.—subpoenas to witnesses.*] That the clerk of the court shall, immediately after filing the petition, give notice thereof by posting in a public and conspicuous place in his office, or in the building in which his office is situated, under an appropriate heading, the name, nativity, and residence of the alien, the date and place of his arrival.

in the United States, and the date, as nearly as may be, for the final hearing of his petition, and the names of the witnesses whom the applicant expects to summon in his behalf; and the clerk shall if the applicant requests it, issue a subpoena for the witnesses so named by the said applicant to appear upon the day set for the final hearing, but in case such witnesses can not be produced upon the final hearing other witnesses may be summoned. (84 Stat. L. 598.)

Sec. 6. [*Filing and docketing—hearings—election-day restriction—change of name.*] That petitions for naturalization may be made and filed during term time or vacation of the court and shall be docketed the same day as filed but final action thereon shall be had only on stated days, to be fixed by rule of the court, and in no case shall final action be had upon a petition until at least ninety days have elapsed after filing and posting the notice of such petition: Provided, That no person shall be naturalized nor shall any certificate of naturalization be issued by any court within thirty days preceding the holding of any general election within its territorial jurisdiction. It shall be lawful, at the time and as a part of the naturalization of any alien, for the court, in its discretion, upon the petition of such alien, to make a decree changing the name of said alien, and his certificate of naturalization shall be issued to him in accordance therewith. (84 Stat. L. 598.)

Sec. 7. [*Naturalization forbidden to anarchists or polygamists.*] That no person who disbelieves in or who is opposed to organized government, or who is a

member of or affiliated with any organization entertaining and teaching such belief in or opposition to organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States, or of any other organized government, because of his or their official character, or who is a polygamist, shall be naturalized or be made a citizen of the United States. (84 Stat. L. 598.)

Sec. 8. [*Speaking English required—physical incapacity—not applicable to prior declarations—homestead entrymen.*] That no alien shall hereafter be naturalized or admitted as a citizen of the United States who can not speak the English language: PROVIDED, That this requirement shall not apply to aliens who are physically unable to comply therewith, if they are otherwise qualified to become citizens of the United States: *And provided further*, That the requirements of this section shall not apply to any alien who has prior to the passage of this Act declared his intention to become a citizen of the United States in conformity with the law in force at the date of making such declaration: *Provided further*, That the requirements of section eight shall not apply to aliens who shall hereafter declare their intention to become citizens and who shall make homestead entries upon the public lands of the United States and comply in all respects with the laws providing for homestead entries on such lands. (84 Stat. L. 599.)

Sec. 9. [*Final hearings—record of orders, etc.*] That every final hearing upon such petition shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the applicant and witnesses shall be examined under oath before the court and in the presence of the court. (84 Stat. L. 599.)

Sec. 10. [*Evidence of Residence.*] That in case the petitioner has not resided in the State, Territory, or district for a period of five years continuously and immediately preceding the filing of his petition he may establish by two witnesses, both in his petition and at the hearing, the time of his residence within the State, provided that it has been for more than one year, and the remaining portion of his five years' residence within the United States required by law to be established may be proved by the depositions of two or more witnesses who are citizens of the United States, upon notice to the Bureau of Immigration and Naturalization and the United States attorney for the district in which said witness may reside. (84 Stat. L. 599.)

Sec. 11. [*Examinations, etc., in opposition.*] That the United States shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition concerning any matter touching or in any way affecting his right to admission to citizenship, and shall

have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings. (84 Stat. L. 599.)

Sec. 12. [*Court to keep duplicates of declarations and certificates—papers in rejected cases—penalty for failure of clerk—responsibility for blanks—return of defaced, etc., blanks—penalty.*] That it is hereby made the duty of the clerk of each and every court exercising jurisdiction in naturalization matters under the provisions of this Act to keep and file a duplicate of each declaration of intention made before him and to the Bureau of Immigration and Naturalization at Washington, within thirty days after the issuance of a certificate of citizenship, a duplicate of such certificate, and to make and keep on file in his office a stub for each certificate so issued by him, whereon shall be entered a memorandum of all essential facts set forth in such certificate. It shall also be the duty of the clerk of each of said courts to report to the said Bureau, within thirty days after the final hearing and decision of the court, the name of each and every alien who shall be denied naturalization, and to furnish to said bureau duplicates of all petitions within thirty days after the filing of the same, and certified copies of such other proceedings and orders instituted in or issued out of said court affecting or relating to the naturalization of aliens as may be required from time to time by the said Bureau. In case any such clerk or officer acting under his direction shall refuse or neglect to comply with any of the foregoing provisions he shall forfeit and pay to the United States

the sum of twenty-five dollars in each and every case in which such violation or omission occurs, and the amount of such forfeiture may be recovered by the United States in an action of debt against such clerk. Clerks of courts having and exercising jurisdiction in naturalization matters shall be responsible for all blank certificates of citizenship received by them from time to time from the Bureau of Immigration and Naturalization, and shall account for the same to the said Bureau whenever required so to do by such Bureau. No certificate of citizenship received by any such clerk which may be defaced or injured in such manner as to prevent its use as herein provided shall in any case be destroyed, but such certificate shall be returned to the said Bureau; and in case any such clerk shall fail to return or properly account for any certificate furnished by the said Bureau, as herein provided, he shall be liable to the United States in the sum of fifty dollars, to be recovered in an action of debt, for each and every certificate not properly accounted for or returned. (34 Stat. L. 599.)

Sec. 18. [*Fees—declaration—petition, certificate, etc.—disposal of fees—deposit by petitioner for expenses—retention by clerk—payment of additional clerks—additional allowance.*] That the clerk of each and every court exercising jurisdiction in naturalization cases shall charge, collect, and account for the following fees in each proceeding: For receiving and filing a declaration of intention and issuing a duplicate thereof, one dollar. For making, filing, and docketing the petition of an alien for admission as a citizen of the

United States and for the final hearing thereon, two dollars; and for entering the final order and the issuance of the certificate of citizenship thereunder, if granted, two dollars. The clerk of any court collecting such fees is hereby authorized to retain one-half of the naturalization fees collected by him in such naturalization proceeding; the remaining one-half of the naturalization fees in each case collected by such clerks, respectively, shall be accounted for in their quarterly accounts, which they are hereby required to render the Bureau of Immigration and Naturalization, and paid over to such Bureau within thirty days from the close of each quarter in each and every fiscal year, and the moneys so received shall be paid over to the disbursing clerk of the Department of Commerce and Labor, who shall thereupon deposit them in the Treasury of the United States, rendering an account therefor quarterly to the Auditor for the State and other Departments, and the said disbursing clerk shall be held responsible under his bond for said fees so received. In addition to the fees herein required, the petitioner shall, upon the filing of his petition to become a citizen of the United States, deposit with and pay to the clerk of the court a sum of money sufficient to cover the expenses of subpoenaing and paying the legal fees of any witnesses for whom he may request a subpoena, and upon the final discharge of such witnesses they shall receive, if they demand the same from the clerk, the customary and usual witness fees from the moneys which the petitioner shall have paid to such clerk for the purpose, and the

residue, if any, shall be returned by the clerk to the petitioner: *Provided*, That the clerks of courts exercising jurisdiction in naturalization proceedings shall be permitted to retain one-half of the fees in any fiscal year up to the sum of three thousand dollars, and that all fees received by such clerks in naturalization proceedings in excess of such amount shall be accounted for and paid over to said Bureau as in case of other fees to which the United States may be entitled under the provisions of this Act. The clerks of the various courts exercising jurisdiction in naturalization proceedings shall pay all additional clerical force that may be required in performing the duties imposed by this Act upon the clerks of courts from fees received by such clerks in naturalization proceedings. And in case the clerk of any court collect fees in excess of the sum of six thousand dollars in any one year, the Secretary of Commerce and Labor may allow to such clerk from the money which the United States shall receive additional compensation for the employment of additional clerical assistance, but for no other purpose, if in the opinion of the said Secretary the business of such clerk warrants such allowance. (34 Stat. L. 600.)

Sec. 14. [*Binding of papers, etc.*] That the declarations of intention and the petitions for naturalization shall be bound in chronological order in separate volumes, indexed, consecutively numbered, and made part of the records of the court. Each certificate of naturalization issued shall bear upon its face, in a place prepared therefor, the volume number and page number

of the petition whereon such certificate was issued, and the volume number and page number of the stub of such certificate. (84 Stat. L. 601.)

Sec. 15. [*Proceedings to cancel certificates illegally procured—notice to holder, etc.—canceling certificates of persons permanently abroad—copy of order of cancellation to Bureau—to court of original issue—canceling records, etc.—application to all certificates.*] That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days' personal notice in which to make answer to the petition of the United States and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought. If any alien who shall have secured a certificate of citizenship under the provisions of this Act shall, within five years after the issuance of such certificate, return to the country

of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly verified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship. Whenever any certificate of citizenship shall be set aside or canceled, as herein provided, the court in which such judgment or decree is rendered shall make an order canceling such certificate of citizenship and shall send a certified copy of such order to the Bureau of Immigration and Naturalization; and in case such certificate was not originally issued by the court making such order it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been originally issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of

the court to enter the same of record and to cancel such original certificate of citizenship upon the records and to notify the Bureau of Immigration and Naturalization of such cancellation. The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this Act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws. (84 Stat. L. 601.)

Sec. 16. [*Punishment for issuing, etc., false certificates.*] That every person who falsely makes, forges, counterfeits, or causes or procures to be falsely made, forged, or counterfeited, or knowingly aids or assists in falsely making, forging, or counterfeiting any certificate of citizenship, with intent to use the same, or with the intent that the same may be used by some other person or persons, shall be guilty of a felony, and a person convicted of such offense shall be punished by imprisonment for not more than ten years, or by a fine of not more than ten thousand dollars, or by both such fine and imprisonment. (84 Stat. L. 602.)

Sec. 17. [*Punishment for engraving, printing, selling, etc., counterfeits.*] That every person who engraves or causes or procures to be engraved, or assists in engraving, any plate in the likeness of any plate designed for the printing of a certificate of citizenship, or who sells any such plate, or who brings into the United States from any foreign place any such plate, except under the direction of the Secretary of Commerce and Labor, or other proper officer, and any person who has

in his control, custody, or possession any metallic plate engraved after the similitude of any plate from which any such certificate has been printed, with intent to use such plate or suffer the same to be used in forging or counterfeiting any such certificate or any part thereof: and every person who prints, photographs, or in any other manner causes to be printed, photographed, made, or executed, any print or impression in the likeness of any such certificate, or any part thereof, or who sells any such certificate, or brings the same into the United States from any foreign place, except by direction of some proper officer of the United States, or who has in his possession a distinctive paper which has been adopted by the proper officer of the United States, for the printing of such certificate, with intent to unlawfully use the same, shall be punished by a fine of not more than ten thousand dollars, or by imprisonment at hard labor for not more than ten years, or by both such fine and imprisonment. (84 Stat. L. 602.)

Sec. 18. [*Punishment for illegally issuing, etc., certificates.*] That it is hereby made a felony for any clerk or other person to issue or be a party to the issuance of a certificate of citizenship contrary to the provisions of this Act, except upon a final order under the hand of a court having jurisdiction to make such order, and upon conviction thereof such clerk or other person shall be punished by imprisonment for not more than five years and by a fine of not more than five thousand dollars, in the discretion of the court. (84 Stat. L. 602.)

Sec. 19. [*Punishment for unlawful possession of*

blank certificates.] That every person who without lawful excuse is possessed of any blank certificate of citizenship provided by the Bureau of Immigration and Naturalization, with intent unlawfully to use the same, shall be imprisoned at hard labor not more than five years or be fined not more than one thousand dollars. (34 Stat. L. 602.)

Sec. 20. [*Punishment for neglecting to render accounts, etc.*] That any clerk or other officer of a court having power under this Act to naturalize aliens, who willfully neglects to render true accounts of moneys received by him for naturalization proceedings or who willfully neglects to pay over any balance of such moneys due to the United States within thirty days after said payment shall become due and demand therefor has been made and refused, shall be deemed guilty of embezzlement of the public moneys, and shall be punishable by imprisonment for not more than five years, or by a fine of not more than five thousand dollars, or both. (34 Stat. L. 602.)

Sec. 21. [*Punishment for receiving, etc., illegal fees.*] That it shall be unlawful for any clerk of any court or his authorized deputy or assistant exercising jurisdiction in naturalization proceedings, to demand, charge, collect, or receive any other or additional fees or moneys in naturalization proceedings save the fees and moneys herein specified; and a violation of any of the provisions of this section or any part thereof is hereby declared to be a misdemeanor and shall be punished by imprisonment for not more than two years, or by a fine

of not more than one thousand dollars, or by both such fine and imprisonment. (84 Stat. L. 602.)

Sec. 22. [*Punishment for issuing false acknowledgments, etc.*] That the clerk of any court exercising jurisdiction in naturalization proceedings, or any person acting under authority of this Act, who shall knowingly certify that a petitioner, affiant, or witness named in an affidavit, petition, or certificate of citizenship, or other paper or writing required to be executed under the provisions of this Act, personally appeared before him and was sworn thereto, or acknowledged the execution thereof or signed the same, when in fact such petitioner, affiant, or witness did not personally appear before him, or was not sworn thereto, or did not execute the same, or did not acknowledge the execution thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not to exceed five years. (84 Stat. L. 608.)

Sec. 28. [*Punishment for fraudulently obtaining naturalization—accessories.*] That any person who knowingly procures naturalization in violation of the provisions of this Act shall be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, and upon conviction the court in which such conviction is had shall thereupon adjudge and declare the final order admitting such person to citizenship void. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication. Any person who knowingly aids, advises, or encourages any person not enti-

filed thereto to apply for or to secure naturalization, or to file the preliminary papers declaring an intent to become a citizen of the United States, or who in any naturalization proceeding knowingly procures or gives false testimony as to any material fact, or who knowingly makes an affidavit false as to any material fact required to be proved in such proceeding, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both. (84 Stat. L. 608.)

Sec. 24. [*Limit for prosecutions.*] That no person shall be prosecuted, tried, or punished for any crime arising under the provisions of this Act unless the indictment is found or the information is filed within five years next after the commission of such crime. (84 Stat. L. 608.)

Sec. 25. [*Prosecution of prior offenses.*] That for the purpose of the prosecution of all crimes and offenses against the naturalization laws of the United States which may have been committed prior to the date when this Act shall go into effect the existing naturalization laws shall remain in full force and effect. (84 Stat. L. 608.)

Sec. 26. [*Laws repealed.*] That sections twenty-one hundred and sixty-five, twenty-one hundred and sixty-seven, twenty-one hundred and sixty-eight, twenty-one hundred and seventy-three, of the Revised Statutes of the United States of America, and section thirty-nine of chapter one thousand and twelve of the Statutes at Large of the United States of America for the year nineteen hundred and three, and all Acts or

parts of Acts inconsistent with or repugnant to the provisions of this Act are hereby repealed. (84 Stat. L. 603.)

[Forms Omitted.]

Sec. 28. [*Rules, etc.—certified copies to be evidence.*] That the Secretary of Commerce and Labor shall have power to make such rules and regulations as may be necessary for properly carrying into execution the various provisions of this Act. Certified copies of all papers, documents, certificates, and records required to be used, filed, recorded, or kept under any and all of the provisions of this Act shall be admitted in evidence equally with the originals in any and all proceedings under this Act and in all cases in which the originals thereof might be admissible as evidence. (84 Stat. L. 606.)

Sec. 29. [*Appropriation—expenditures.*] That for the purpose of carrying into effect the provisions of this Act there is hereby appropriated the sum of one hundred thousand dollars, out of any moneys in the Treasury of the United States not otherwise appropriated, which appropriation shall be in full for the objects hereby expressed until June thirtieth, nineteen hundred and seven; and the provisions of section thirty-six hundred and seventy-nine of the Revised Statutes of the United States shall not be applicable in any way to this appropriation: (84 Stat. L. 606.)

Sec. 80. [*Naturalization of persons owing allegiance but not United States citizens.*] That all the applicable provisions of the naturalization laws of the United

States shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any State or organized Territory of the United States, with the following modifications: The applicant shall not be required to renounce allegiance to any foreign sovereignty; he shall make his declaration of intention to become a citizen of the United States at least two years prior to his admission; and residence within the jurisdiction of the United States, owing such permanent allegiance, shall be regarded as residence within the United States, within the meaning of the five years' residence clause of the existing law. (84 Stat. L. 606.)

Sec. 81. [*Effect—bureau sections.*] That this Act shall take effect and be in force from and after ninety days from the date of its passage: *Provided*, That sections one, two, twenty-eight, and twenty-nine shall go into effect from and after the passage of this Act. (84 Stat. L. 607.)

APPENDIX II.

ORDINANCE OF 1787.

[THE CONFEDERATE CONGRESS, JULY 13, 1787.]

An Ordinance for the government of the territory of the United States northwest of the river Ohio.

Sec. 1. *Be it ordained by the United States in Congress assembled,* That the said territory, for the purpose of temporary government, be one district, subject, however, to be divided into two districts, as future circumstances may, in the opinion of Congress, make it expedient.

Sec. 2. *Be it ordained by the authority aforesaid,* That the estates both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to, and be distributed among their children and the descendants of a deceased child in equal parts, the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them; and where there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parent's share; and there shall, in no case, be a distinction between kindred

of the whole and half blood; saving in all cases to the widow of the intestate, her third part of the real estate for life, and one-third part of the personal estate; and this law relative to descents and dower, shall remain in full force until altered by the legislature of the district. And until the governor and judges shall adopt laws as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her in whom the estate may be, (being of full age,) and attested by three witnesses; and real estates may be conveyed by lease and release, or bargain and sale, signed, sealed, and delivered by the person, being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, and such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers, shall be appointed for that purpose; and personal property may be transferred by delivery, saving, however, to the French and Canadian inhabitants, and other settlers of the Kaskaskies, Saint Vincents, and the neighboring villages, who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance of property.

Sec. 8. *Be it ordained by the authority aforesaid,* That there shall be appointed, from time to time, by Congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress; he shall reside in the district, and

have a freehold estate therein, in one thousand acres of land, while in the exercise of his office.

Sec. 4. There shall be appointed from time to time, by Congress, a secretary, whose commission shall continue in force for four years, unless sooner revoked; he shall reside in the district, and have a freehold estate therein, in five hundred acres of land, while in the exercise of his office. It shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department, and transmit authentic copies of such acts and proceedings every six months to the Secretary of Congress. There shall also be appointed a court, to consist of three judges, any two of whom to form a court, who shall have a common-law jurisdiction, and reside in the district, and have each therein a freehold estate, in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behavior.

Sec. 5. The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district, and report them to Congress from time to time, which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

Sec. 6. The governor, for the time being, shall be commander-in-chief of the militia, appoint and commis-

sion all officers in the same below the rank of general officers; all general officers shall be appointed and commissioned by Congress.

Sec. 7. Previous to the organization of the general assembly the governor shall appoint such magistrates, and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order in the same. After the general assembly shall be organized the powers and duties of magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the governor.

Sec. 8. For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed, from time to time, as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

Sec. 9. So soon as there shall be five thousand free male inhabitants, of full age, in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their counties or townships, to represent them in the general assembly: *Provided*, That for every five hun-

dred free male inhabitants there shall be one representative, and so on, progressively, with the number of free male inhabitants, shall the right of representation increase, until the number of representatives shall amount to twenty-five; after which the number and proportion of representatives shall be regulated by the legislature: *Provided*, That no person be eligible or qualified to act as a representative, unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and, in either case, shall likewise hold in his own right, in fee-simple, two hundred acres of land within the same: *Provided also*, That a freehold in fifty acres of land in the district, having been a citizen of one of the States, and being resident in the district, or the like freehold and two years' residence in the district, shall be necessary to qualify a man as an elector of a representative.

Sec. 10. The representatives thus elected shall serve for the term of two years; and in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township, for which he was a member, to elect another in his stead, to serve for the residue of the term.

Sec. 11. The general assembly, or legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by Congress; any three of whom to be a quorum; and the members of the council shall be nom-

inated and appointed in the following manner, to wit: As soon as representatives shall be elected the governor shall appoint a time and place for them to meet together, and when met they shall nominate ten persons, resident in the district, and each possessed of a freehold in five hundred acres of land, and return their names to Congress, five of whom Congress shall appoint and commission to serve as aforesaid; and whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to Congress, one of whom Congress shall appoint and commission for the residue of the term; and every five years, four months at least before the expiration of the time of service of the members of the council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to Congress, five of whom Congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives shall have authority to make laws in all cases for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill, or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve the

general assembly when, in his opinion, it shall be expedient.

Sec. 12. The governor, judges, legislative council, secretary, and such other officers as Congress shall appoint in the district, shall take an oath or affirmation of fidelity, and of office; the governor before the President of Congress, and all other officers before the governor. As soon as a legislature shall be formed in the district, the council and house assembled, in one room, shall have authority, by joint ballot, to elect a delegate to Congress, who shall have a seat in Congress, with a right of debating, but not of voting, during this temporary government.

Sec. 13. And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory; to provide, also, for the establishment of States, and permanent government therein, and for their admission to a share in the Federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest:

Sec. 14. It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent, to wit:

ARTICLE I.

No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territories.

ARTICLE II.

The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed.

ARTICLE III.

Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

ARTICLE IV.

The said territory, and the States which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the Federal debts, contracted, or to be contracted, and a proportional part of the expenses of government to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other

States; and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures of the district, or districts, or new States, as in the original States, within the time agreed upon by the United States in Congress assembled. The legislatures of those districts, or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers. No tax shall be imposed on lands the property of the United States; and in no case shall non-resident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

ARTICLE V.

There shall be formed in the said territory not less than three nor more than five States; and the boundaries of the States, as soon as Virginia shall alter her act of cession and consent to the same, shall become fixed and established as follows, to wit: The western State, in the said territory, shall be bounded by the Mississippi, the Ohio, and the Wabash Rivers; a direct line drawn from the Wabash and Post Vincents, due north,

to the territorial line between the United States and Canada; and by the said territorial line to the Lake of the Woods and Mississippi. The middle State shall be bounded by the said direct line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a direct line drawn due north from the mouth of the Great Miami to the said territorial line, and by the said territorial line. The eastern State shall be bounded by the last-mentioned direct line, the Ohio, Pennsylvania, and the said territorial line: *Provided, however,* And it is further understood and declared, that the boundaries of these three States shall be subject so far to be altered, that, if Congress shall hereafter find it expedient, they shall have authority to form one or two States in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan. And whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State government: *Provided,* The constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these articles, and, so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than sixty thousand.

ARTICLE VI.

There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: *Provided always*, That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid.

Be it ordained by the authority aforesaid, That the resolutions of the 23d of April, 1784, relative to the subject of this ordinance, be, and the same are hereby, repealed, and declared null and void.

Done by the United States in Congress assembled, the 13th day of July, in the year of our Lord 1787, and of their sovereignty and independence the twelfth.*

*See *Wallace v. Parker*, 6 Pet. 680; *Pollard v. Hagan*, *Permoli v. First Municipality*, 3 How. 212, 589; *Jones v. Van Zandt*, 5 How. 215; *Strader v. Graham*, 10 How. 82; *Pennsylvania v. Wheeling Bridge Company*, 18 How. 421; *Bates v. Brown*, 5 Wall. 710; *Messenger v. Mason*, 10 Wall. 507; *Clinton v. Englebrecht*, 13 Wall. 434; *Langdean v. Hanes*, 21 Wall. 521; *Morton v. Nebraska*, 21 Wall. 660; *Packet Co. v. Keokuk*, 95 U. S. 80; *Spooner v. McConnell*, 1 McLean 336; *Palmer v. Cuyahoga Co.*, 3 McLean 226; *Hogg v. Zanesville, etc., Co.*, 5 O. 410; *Perry v. Torrence*, 8 O. 522; *Hutchinson v. Thompson*, 9 O. 52; *Cochran v. Loring*, 17 O. 409.

QUESTIONS FOR STUDENTS.

The questions are numbered to correspond with the sections in this book. The answers and references for further study may be obtained by referring to the corresponding sections.

CHAPTER I.

51. What may be said as to the rapid development of the United States?

52. In whose possession did Columbus find the New World? What particular significance to the Old World did this discovery have?

53. What nations established colonies in America?

54. Describe the English colonies in America.

55. How and when was the first written Constitution adopted?

56. What was the New England Confederation?

57. What colonies had proprietary governments?

58. Explain, and distinguish between, Provincial, Charter and Proprietary government.

59. What were the grounds of dispute with England?

60. Describe the first attempt to unite the colonies.

61. Why was the attempt of Parliament to tax the colonies resisted?

62. When and why was the Colonial Congress called?

63. What taxes were levied upon the colonists after the repeal of the Stamp Act?

64. What was the date and purpose of the first Continental Congress?

65. Describe the circumstances under which the second Continental Congress met.

66. State all you can in regard to the adoption of the Declaration of Independence.

67. What may be said of the Declaration as fundamental law?

68. When and by whom were the Articles of Confederation adopted and ratified?

69. What sort of a union did the Articles form? What powers were given to the Congress?

70. Explain the defects in the Articles in respect to the formation of a practical central government.

71, 72. What attempts were made to revise the Articles of Confederation?

73. What was the purpose of the Philadelphia, or Constitutional Convention? When and for how long did it meet, and what may be said of its proceedings?

74. Describe the method by which the Constitution was ratified. When did it go into effect?

75. What may be said as to a bill of rights in the Constitution?

CHAPTER II.

76. Define and explain sovereignty.

77. In whom does sovereignty reside under our theory of government? How can you explain the existence of dual governments when sovereignty is indivisible?

78-80. Explain how sovereign States may associate, and define and distinguish between a confederation and a federal state.

81. Is the United States a federal state? Explain your answer.

82. What is a federal government?

83. Is the United States a federal government? Explain your answer.

84. Define a Constitution.

85. Define and explain written and unwritten Constitutions.

86. What may be said for and against written Constitutions?

87. Define Constitutional Law.

88. Explain the relation between the States and the United States as established by the Constitution. Which is the paramount authority?

89-91. Describe fully the usual construction of written Constitutions. What may be said as to the division of governmental powers between the three departments?

CHAPTER III.

92. Repeat the preamble. What is meant by a preamble?

93. What may be said as to "the people of the United States?"

94. What is the purpose of the Constitution as stated in the preamble?

95. Explain what is meant by a bicameral legislature.

96. What body possesses the legislative power of the United States?

97. By whom are the Representatives chosen?

98. How is it determined who shall vote for Representatives?

99. What are the qualifications for Representatives?

100, 101. Explain how Representatives are apportioned among the several States?

102. How is the basis of representation determined, and how often?

103. How are vacancies in the House filled? Why?

104. What may be said as to the powers of the Speaker of the House?

105. What is meant by impeachment, and what are the Constitutional provisions regarding impeachment?

106. How is representation in the Senate determined? Why? How often are they elected? Why?

107. What is the purpose of renewing the Senate in part each two years?

108. How are vacancies in the Senate filled?

109. What are the qualifications of Senators?

110. Who presides over the Senate?

111. What may be said as to the organization of the Senate?

112. What power has the Senate over impeachments?

113. What is the constitutional provision in regard to federal elections, and what action has Congress taken thereunder?

114. How often does Congress meet? What is meant by "a Congress?"

115. Give the provisions of Art. I., Sec. 5, cl. 1. What is meant by a quorum?

116-118. What power to establish rules of procedure and punish members is given to the two houses?

119. What provision is made for preserving a record of legislative proceedings?

120. When may the yeas and nays be entered on the journal?

121. How are the two houses made dependent on each other?

122. What provision is made for paying the federal legislators?

123, 124. What is the purpose of members being privileged from arrest, and from being questioned for any speech or debate in the houses?

125. Explain the purpose of cl. 2 of Art. I., Sec. 6.

126. Where must all revenue measures originate? Explain why.

127, 128. Describe the mode of passing laws.

129, 130. What is meant by the veto power? What is the nature of the power as granted to the President? What measures may be vetoed?

CHAPTER IV.

131. Explain how a grant of powers to Congress is also a grant to the other departments.

132. Explain fully what is meant by exclusive and concurrent powers.

133, 134. Give the clause conferring the federal taxing power. In what respects is the power limited? What may be said in regard to the punctuation of the clause?

135. What are the limitations as to the purpose of the tax?

136, 137. What are the limitations as respects the manner of taxing? What are direct taxes? What is the limitation in regard to direct taxes? Describe the change in the construction of the phrase "direct taxes." Is an income tax a direct tax? Give reason for your answer.

138. Can the States tax federal agencies? Explain fully and give the leading case.

139, 140. What is the extent of the power to borrow

money? Explain the history and present status of legal tender paper money.

141. What are the express restrictions on the commerce power?

142. What is meant by regulating commerce? Does this power extend to developed agencies of communication and transportation?

143. When is the commerce power exclusive, and when concurrent?

144. To what extent may the regulation of commerce with foreign nations be carried?

145, 146. Explain the federal power over commerce between States, and discuss the leading cases. What was the decision in the "original package" cases?

147, 148. In what way have the States an indirect power to regulate interstate commerce? Name some valid regulations by the States. Name some cases to which the police power does not extend.

149. Explain the nature and purpose of the federal Interstate Commerce Act.

150. To what extent may Congress control commerce with the Indians?

151. What power has Congress over naturalization? What is meant by naturalization?

152. What regulation has Congress made in regard to naturalization?

153. What power has Congress over bankruptcies? What is the nature of the bankruptcy law now in force?

154. What is meant by coining money? Where

does the power to coin money reside? Describe fully what action Congress has taken under the power.

155, 156. What power has Congress over weights and measures? Over counterfeiting?

157. Describe and discuss the nature of the federal power over postoffices and postroads.

158. Give the clause under which patents and copyrights are protected. Define a patent, a copyright, a trademark.

159. Define piracy. What is meant by the high seas? What is meant by offenses against the law of nations?

160. Define war. What is the war and military power of Congress? Explain letters of marque and reprisal.

161. What restriction is placed on the power to raise and support armies?

162. What is meant by the militia? In what cases may they be employed? Describe the organization of the militia.

163. What power has Congress over ceded districts? Discuss the status of the inhabitants of such districts.

164. Give the clause on which the implied powers are based. Describe fully the construction given this clause and the leading cases.

CHAPTER V.

165. What compromise was made in regard to the importation of slaves?

166. Explain the purpose of the writ of habeas corpus. When and by whom may the privilege of the writ be suspended?

167. What is meant by a bill of attainder? Why are they prohibited?

168. Discuss ex post facto laws and give instances of what are ex post facto laws.

169. How may money be drawn from the treasury of the United States?

170. What provision in the Constitution regarding titles of nobility?

171. What powers are denied the States by Sec. 10 of Art. I.? What are bills of credit?

172. What contracts are affected by the provision against the impairing of the obligation of contracts? What was the effect of the decision in the Dartmouth College Case? Give some principles modifying that doctrine. What is meant by obligation of a contract?

173. Specify legislation that would impair the obligation of contracts. Distinguish between the impairing of the obligation and impairing the remedy for a breach of contract.

174. What is meant by tonnage duty? How and why are the States restricted in this regard?

175. Name some of the implied restrictions on legislative power.

CHAPTER VI.

176. What dispute arose in the Convention over the term of the President?

177. Explain how the President was to be elected indirectly. What change was made by the XIIth Amendment in the election of President and Vice President?

178. Discuss the power of the President as Commander-in-chief. What is meant by "the Cabinet?" Discuss the pardoning power.

179. What are treaties, and what power has the President in making them?

180. What appointing power has the executive?

181. Discuss the duties of the President.

182. What officers are subject to impeachment and for what offenses?

CHAPTER VII.

183. What may be said of the judiciary as a department of government? What peculiar power have the courts assumed in interpreting the Constitution? Give the rules followed in making decisions on constitutional questions. Give the rules of interpretation.

184. Give the Constitutional provision respecting

the vesting of the judicial power in the courts. Describe the federal courts as established by Congress.

185. Describe each of the nine classes of cases in which the federal courts are given jurisdiction by the Constitution. Why was the Eleventh Amendment necessary?

186. Discuss what law is applied in decisions by the federal courts.

187. What is meant by original jurisdiction? By appellate jurisdiction? In what cases has the Supreme Court original jurisdiction? How is the appellate jurisdiction of the federal courts fixed?

188. Over what classes of cases have the federal courts been given exclusive jurisdiction? Concurrent jurisdiction?

189. What federal courts may issue the writ of habeas corpus?

190. How are crimes to be tried? What exception? What is meant by jury trial?

191. Define treason. What is meant by constructive treason? Why has treason been defined and Congress limited in punishing it?

CHAPTER VIII.

192. In what respects does the Constitution seek to nationalize the people?

193. Explain what is meant by "full faith and credit." How may the judgment of the court of another State be defeated? How are public acts authenticated?

194. Describe what is meant by and included in the privileges and immunities to which the citizens of the several States are entitled.

195. What is meant by extradition? In what cases and under what conditions may a person be extradited?

196. What Constitutional provision is made for the admission of new States?

197, 198. Give the provision of Sec. 4, Art. IV., and explain what is meant by a republican government. When are the States to be protected against domestic violence?

199. How may the Constitution be amended?

200. Give the provisions of Art. VI. of the Constitution. Why are test oaths forbidden?

CHAPTER IX.

201. How were the amendments adopted? What is the purpose of the first ten? Of the last three?

202. Discuss the freedom of religion, of speech and of the press.

203. Give and discuss the second and third amendments.

204. What are the provisions in regard to search warrants?

205. Discuss the provisions of the fifth amendment.

206. Give the provisions of the sixth amendment.

207, 208. Give and describe the seventh and eighth amendments.

209. Do the first eight amendments limit the authority of the States?

210. Discuss the ninth and tenth amendments.

211. When was the thirteenth amendment adopted and what was its purpose?

212. What is the purpose of the fourteenth amendment? What, if any, difference is made in regard to United States citizenship by this amendment? Does it change the federal character of the Union?

213. In what way does the fifteenth amendment restrict the States? Is any one given the right to vote by this amendment?

CHAPTER X.

214. What is the basis of the government of the States?

215. Discuss the makeup of State Constitutions.

216. Describe the legislature in your own State, and give the qualifications and terms of office of members.

217. What distinction between the Constitutions of the States and of the United States in respect to granting powers? How is the legislative authority of the States regulated? Discuss fully.

218. What may be said in regard to limiting or expanding the sphere of governmental activity?

219. Discuss the executive department in State government.

220. Describe the powers and duties of the governor in your State.

221. Name the assistant executive officers in your State and specify whether they are elected or appointed.

222. Describe fully the courts of your State and explain the jurisdiction granted to each. What distinction, if any, exists between common law and equity in your State?

223, 224. Describe the minor civil divisions of your State.

225. What is meant by a municipal corporation? How are they incorporated in your State?

226. What may be said of the taxing power of the States?

227. Explain the organization of the schools in your State.

228. What penal and charitable institutions are supported by your State? What public works, if any?

229-232. Define and discuss fully the police power of the States. How might trusts and monopolies be restrained?

233. How may the Constitution of your State be amended? What are some of the checks and balances in our system of government?

234. Give seven rules in the construction of Constitutions.

235. What other books have you read in preparing this subject?

CONSTITUTION OF THE UNITED STATES.

1. What are the objects to be attained in ordaining and establishing the Constitution for the United States of America, as expressed in the preamble?

2. Name the three great powers of the government of the United States, and in what departments of the government does the Constitution repose the exercise of each?

3. What was the object of giving representation in the House of Representatives to the several States in proportion to population and of giving each State equal representation in the Senate?

4. In which branch of Congress must all revenue bills originate, and why?

5. What do you understand by the terms "enumerated" and "implied powers," as applied to the Constitution?

ABBREVIATIONS USED IN CITING AUTHORITIES

- Am.**—American.
Ante.—Before.
Art.—Article.
Bl. Com.—Blackstone's Commentaries.
Blatchf.—Blatchford's U. S. Circuit Court Reports.
Cent.—Century.
Ch.—Chapter, Chief.
Const.—Constitution, or Constitutional.
Com.—Commentaries.
Com. Com.—Commerce Commission.
Con.—Congress, or Congressional.
Co.—Company.
Dall.—Dallas' U. S. Supreme Court Reports.
Dict.—Dictionary.
Ed.—Edition.
Et seq.—Et sequitur (and the following).
El. & B.—Ellis & Blackburn, English Reports.
Fla.—Florida Reports.
Fed.—Federal Reports.
Ga.—Georgia Reports.
Gov.—Government.
Hist.—History.
How.—Howard's United States Supreme Court Reports.
Idem.—The same.
Ill.—Illinois Reports.
Ind.—Indiana Reports.
Jour.—Journal.
La. Ann.—Louisiana Annual Reports.
Mass.—Massachusetts Reports.
Mod.—Modern's English Reports.

- Mo.**—Missouri Reports.
N.—Note.
N. E. Rep.—North Eastern Reporter.
No.—Number, North.
N. J.—New Jersey Reports.
N. S.—New Series.
N. Y.—New York Reports.
Pa. St.—Pennsylvania State Reports.
Pet.—Peters' U. S. Supreme Court Reports.
Prin.—Principles.
Q. v.—Quod vide (which see).
Q. B.—Queen's Bench Reports.
Reg.—Register.
Rev.—Revised, Review.
Sawy.—Sawyer's U. S. Circuit Court Reports.
Sec.—Section.
Secs.—Sections.
St.—State.
Stat.—Statutes.
U. S.—United States, United States Reports.
V., or vs.—Versus (against).
Vol.—Volume.
Wall.—Wallace's U. S. Supreme Court Reports.
Wheat.—Wheaton's U. S. Supreme Court Reports.
Wash. C. C.—Washington's U. S. Circuit Court Reports.
Wis.—Wisconsin.

CONSTITUTIONAL LAW

LEADING CASES

SELECTED AND ARRANGED TO COMPLEMENT THE
TEXT ON THIS SUBJECT

BY

HON. CHARLES E. CHADMAN, LL.B., LL.M., LL.D.

CASE BOOK—VOLUME II

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CASES ON CONSTITUTIONAL LAW

CHAPTER I.

THE RESIDENCE OF SOVEREIGNTY.*

LICENSE CASES.

THURLOW v. THE COMMONWEALTH OF MASSACHUSETTS.

FLETCHER v. THE STATE OF RHODE ISLAND.

PEIRCE ET AL. v. THE STATE OF NEW HAMPSHIRE.

Reported in 5 Howard (U. S.) 504. (1846.)

These three cases came up on writs of error under the 25th section of the judiciary Act of 1789 (1 Stats. at Large, 85) and were argued together. . . .

It is not deemed necessary to set out the statutes on which the indictments were found. Their substance and effect are clearly stated in the opinions of the justices, and there was no controversy concerning their construction, or meaning and effect.

No opinion of the court was pronounced. Each justice gave his own reasons for affirming the decisions in the state courts.

TANEY, C. J. In the case of *Thurlow v. The State of Massachusetts*, of *Fletcher v. The State of Rhode Island*, and of *Peirce et al. v. The State of New Hampshire*, the judgments of the respective state courts are severally affirmed. The justices of this court do not, however, altogether agree in the principles upon which these cases are decided, and I therefore proceed

* See Section 77, Vol. 2, *Cyclopedia of Law*.

to state the grounds upon which I concur in affirming the judgments. The first two of these cases depend upon precisely the same principles; and, although the case against the State of New Hampshire differs in some respects from the others, yet there are important principles common to all of them, and on that account it is more convenient to consider them together. Each of the cases has arisen upon state laws, passed for the purpose of discouraging the use of ardent spirits within their respective territories, by prohibiting their sale in small quantities, and without licenses previously obtained from the state authorities. And the validity of each of them has been drawn in question, upon the ground that it is repugnant to that clause of the constitution of the United States which confers upon congress the power to regulate commerce with foreign nations, and among the several States.

The constitution of the United States declares that that constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made; under the authority of the United States, shall be the supreme law of the land. It follows that a law of congress, regulating commerce with foreign nations, or among the several States, is the supreme law; and if the law of a State is in conflict with it, the law of congress must prevail, and the state law cease to operate so far as it is repugnant to the law of the United States.

It is equally clear that the power of congress over this subject does not extend further than the regulation of commerce with foreign nations and among the several States; and that beyond these limits, the States have never surrendered their power over trade and commerce, and may still exercise it, free from any controlling power on the part of the general government. Every State, therefore, may regulate its own internal traffic, according to its own judgment, and upon its own views of the interest and well-being of its citizens.

I am not aware that these principles have ever been questioned. The difficulty has always arisen on their application; and that difficulty is now presented in the Rhode Island and Massachusetts cases, where the question is, how far a State may regulate or prohibit the sale of ardent spirits, the importation of which from foreign countries has been authorized by con-

gress. Is such a law a regulation of foreign commerce, or of the internal traffic of the State?

It is unquestionably no easy task to mark, by a certain and definite line, the division between foreign and domestic commerce, and to fix the precise point, in relation to every imported article, where the paramount power of congress terminates, and that of the State begins. The constitution itself does not attempt to define these limits. They cannot be determined by the laws of congress or the States, as neither can, by its own legislation, enlarge its own powers, or restrict those of the other. And as the constitution itself does not draw the line, the question is necessarily one for judicial decision, and depending altogether upon the words of the constitution.

This question came directly before the court, for the first time, in the case of *Brown v. The State of Maryland*, 12 Wheat. 419. And the court there held that an article authorized by a law of congress to be imported, continued to be a part of the foreign commerce of the country while it remained in the hands of the importer for sale, in the original bale, package, or vessel in which it was imported; that the authority given to import necessarily carried with it the right to sell the imported article in the form and shape in which it was imported; and that no State, either by direct assessment, or by requiring a license from the importer before he was permitted to sell, could impose any burden upon him or the property imported beyond what the law of congress had itself imposed; but that, when the original package was broken up, for use or for retail by the importer, and also when the commodity had passed from his hands into the hands of a purchaser, it ceased to be an import, or a part of foreign commerce, and became subject to the laws of the State, and might be taxed for state purposes, and the sale regulated by the State, like any other property. This I understand to be substantially the decision in the case of *Brown v. The State of Maryland*, drawing the line between foreign commerce, which is subject to the regulation of congress, and internal or domestic commerce, which belongs to the States, and over which congress can exercise no control.

I argued the case in behalf of the State, and endeavored to maintain that the law of Maryland, which required the importer as well as other dealers to take out a license before he could sell,

and for which he was to pay a certain sum to the State, was valid and constitutional; and certainly I at that time persuaded myself that I was right, and thought the decision of the court restricted the powers of the State more than a sound construction of the constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down by the supreme court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the States on the other, and preventing collision between them.

. . .

Undoubtedly a State may impose a tax upon its citizens in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen, and is chargeable according to the amount of his property, whether it consist of money engaged in trade, or of imported goods which he proposes to sell, or any other property of which he is the owner. But a tax of this description stands upon a very different footing from a tax on the thing imported, while it remains a part of foreign commerce, and is not introduced into the general mass of property in the State. Nor, indeed, can it even influence materially the price of the commodity to the consumer, since foreigners, as well as citizens of other States, who are not chargeable with the tax, may import goods into the same place and offer them for sale in the same market, and with whom the resident merchant necessarily enters into competition.

Adopting, therefore, the rule as laid down in *Brown v. The State of Maryland*, 12 W. 419, I proceed to apply it to the cases of Massachusetts and Rhode Island. The laws of congress regulating foreign commerce authorize the importation of spirits, distilled liquors, and brandy, in casks or vessels not containing less than a certain quantity, specified in the laws upon this subject. Now, if the state laws in question came in collision with those acts of Congress, and prevented or obstructed the importation or sale of these articles by the importer in the original cask or vessel in which they were imported, it would be the duty of this court to declare them void.

It has, indeed, been suggested, that, if a State deems the traffic in ardent spirits to be injurious to its citizens, and calculated to introduce immorality, vice, and pauperism into the State, it may

constitutionally refuse to permit its importation, notwithstanding the laws of congress; and that a State may do this upon the same principles that it may resist and prevent the introduction of disease, pestilence, or pauperism from abroad. But it must be remembered that disease, pestilence, and pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight or human means can guard against them. But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter, and traffic, like any other commodity in which a right of property exists. And congress, under its general power to regulate commerce with foreign nations, may prescribe what article of merchandise shall be admitted, and what excluded; and may therefore admit, or not, as it shall seem best, the importation of ardent spirits. And inasmuch as the laws of congress authorize their importation, no State has a right to prohibit their introduction.

But I do not understand the law of Massachusetts or Rhode Island as interfering with the trade in ardent spirits while the article remains a part of foreign commerce, and is in the hands of the importer for sale, in the cask or vessel in which the laws of congress authorize it to be imported. These state laws act altogether upon the retail or domestic traffic within their respective borders. They act upon the article after it has passed the line of foreign commerce, and become a part of the general mass of property in the State. These laws may, indeed, discourage imports, and diminish the price which ardent spirits would otherwise bring. But although a State is bound to receive and to permit the sale by the importer of any article of merchandise which congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic,

or from prohibiting it altogether, if it thinks proper. Of the wisdom of this policy, it is not my province or my purpose to speak. Upon that subject, each State must decide for itself. I speak only of the restrictions which the constitution and laws of the United States have imposed upon the States. And as the laws of Massachusetts and Rhode Island are not repugnant to the constitution of the United States, and do not come in conflict with any law of congress passed in pursuance of its authority to regulate commerce with foreign nations and among the several States, there is no ground upon which this court can declare them to be void.

I now come to the New Hampshire case, in which a different principle is involved,—the question, however, arising under the same clause in the constitution, and depending on its construction.

The law of New Hampshire prohibits the sale of distilled spirits, in any quantity, without a license from the selectmen of the town in which the party resides. The plaintiffs in error, who were merchants in Dover, in New Hampshire, purchased a barrel of gin in Boston, brought it to Dover, and sold it in the cask in which it was imported, without a license from the selectmen of the town. For this sale they were indicted, convicted, and fined, under the law above mentioned.

The power to regulate commerce among the several States is granted to congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations, and is co-extensive with it. And, according to the doctrine in *Brown v. Maryland*, the article in question, at the time of the sale, was subject to the legislation of congress.

The present case, however, differs from *Brown v. The State of Maryland* in this,—that the former was one arising out of commerce with foreign nations, which congress had regulated by law; whereas the present is a case of commerce between two States, in relation to which congress has not exercised its power. Some acts of congress have indeed been referred to in relation to the coasting trade. But they are evidently intended merely to prevent smuggling, and do not regulate imports or exports from one State to another. This case differs also from the cases of Massachusetts and Rhode Island; because, in these two cases, the laws of States operated upon the articles after they had

passed beyond the limits of foreign commerce, and consequently were beyond the control and power of congress. But the law of New Hampshire acts directly upon an import from one State to another, while in the hands of the importer for sale, and is therefore a regulation of commerce, acting upon the article while it is within the admitted jurisdiction of the general government, and subject to its control and regulation.

*The question therefore brought up for decision is, whether a State is prohibited by the constitution of the United States from making any regulations of foreign commerce, or of commerce with another State, although such regulation is confined to its own territory and made for its own convenience or interest, and does not come in conflict with any law of congress. In other words, whether the grant of power to congress is of itself a prohibition to the States, and renders all state laws upon the subject null and void. This is the question upon which the case turns; and I do not see how it can be decided upon any other ground, provided we adopt the line of division between foreign and domestic commerce as marked out by the court in *Brown v. The State of Maryland*. I proceed, therefore, to state my opinion upon it.*

It is well known that upon this subject a difference of opinion has existed, and still exists, among the members of this court. But with every respect for the opinion of my brethren with whom I do not agree, it appears to me to be very clear, that the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States. The controlling and supreme power over commerce with foreign nations and the several States is undoubtedly conferred upon congress. Yet, in my judgment, the State may, nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid unless they come in conflict with a law of congress. Such evidently, I think, was the construction which the constitution universally received at the time of its adoption, as appears from the legislation of congress and of the several States; and a careful examination of the decisions of this court will show, that, so far from sanction-

ing the opposite doctrine, they recognize and maintain the power of the States. . . .

The decisions of this court will, also, in my opinion, when carefully examined, be found to sanction the construction I am maintaining. It is not my purpose to refer to all of the cases in which this question has been spoken of, but only to the principal and leading ones; and,—

First, to *Gibbons v. Ogden*, 9 Wheat. 1, because this is the case usually referred to and relied on to prove the exclusive power of congress and the prohibition to the States. It is true that one or two passages in that opinion, taken by themselves, and detached from the context, would seem to countenance this doctrine. And, indeed, it has always appeared to me that this controversy has mainly arisen out of that case, and that this doctrine of the exclusive power of congress, in the sense in which it is now contended for, is comparatively a modern one, and was never seriously put forward in any case until after the decision of *Gibbons v. Ogden*, although it has been abundantly discussed since. Still, it seems to me to be clear, upon a careful examination of that case, that the expressions referred to do not warrant the inference drawn from them, and were not used in the sense imputed to them; and that the opinion in that case, when taken altogether and with reference to the subject-matter before the court, establishes the doctrine that a State may, in the execution of its powers of internal police, make regulations of foreign commerce; and that such regulations are valid, unless they come into collision with a law of congress. Upon examining that opinion, it will be seen that the court, when it uses the expressions which are supposed to countenance the doctrine of exclusive power in congress, is commenting upon the argument of counsel in favor of equal powers on this subject in the States and the general government, where neither party is bound to yield to the other; and is drawing the distinction between cases of concurrent powers and those in which the supreme or paramount power was granted to congress. It therefore very justly speaks of the States as exercising their own powers in laying taxes for state purposes, although the same thing is taxed by congress; and as exercising the powers granted to congress when they make regulations of commerce. In the first case, the state power is concurrent with that of the general government,—

is equal to it, and is not bound to yield. In the second, it is subordinate and subject to the superior and controlling power conferred upon congress.

Moreover the court distinctly admits, on pages 205, 206, that a State may, in the execution of its police and health laws, make regulations of commerce, but which congress may control. It is very clear, that, so far as these regulations are merely internal, and do not operate on foreign commerce, or commerce among the States, they are altogether independent of the power of the general government and cannot be controlled by it. The power of control, therefore, which the court speaks of, presupposes that they are regulations of foreign commerce, or commerce among the States. And if a State, with a view to its police or health, may make valid regulations of commerce which yet fall within the controlling power of the general government, it follows that the State is not absolutely prohibited from making regulations of foreign commerce within its own territorial limits, provided they do not come in conflict with the laws of congress.

It has been said, indeed, that quarantine and health laws are passed by the States, not by virtue of a power to regulate commerce, but by virtue of their police powers, and in order to guard the lives and health of their citizens. This, however, cannot be said of the pilot laws, which are yet admitted to be equally valid. But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. . . .

Upon this question, the object and motive of the State are of no importance, and cannot influence the decision. It is a question of power. Are the States absolutely prohibited by the constitution from making any regulations of foreign commerce? If they are, then such regulations are null and void, whatever may have been the motive of the State, or whatever the real object of the law; and it requires no law of congress to control or annul them. Yet the case of *Gibbons v. Ogden*, 9 Wheat. 1, unquestionably affirms that such regulations may be made by a State, subject to the controlling power of congress. And if this may be done, it necessarily follows that the grant of power to the federal government is not an absolute and entire prohibition to the States, but merely confers upon congress the superior and con-

trolling power. And to expound the particular passages hereinbefore mentioned in the manner insisted upon by those who contend for the prohibition, would be to make different parts of that opinion inconsistent with each other,—an error which I am quite sure no one will ever impute to the very eminent jurist by whom the opinion was delivered.

And that the meaning of the court in the case of *Gibbons v. Ogden* was such as I have insisted on, is, I think, conclusively proved by the case of *Willson et al. v. The Blackbird Creek Marsh Company*, 2 Pet. 251, 252. In that case, a dam authorized by a state law had been erected across a navigable creek, so as to obstruct the commerce above it. And the validity of the state law was objected to, on the ground that it was repugnant to the constitution of the United States, being a regulation of commerce. But the court says: "The repugnancy of the law of Delaware to the constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations, and among the several States; a power which has not been so exercised as to affect the question," and then proceeds to decide that the law of Delaware could not "be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject." . . .

For my own part, I have always regarded the cases of *Gibbons v. Ogden*, 9 Wheat. 1, and *Willson et al. v. The Blackbird Creek Marsh Company*, 2 Pet. 245, as abundantly sufficient to sanction the construction of the constitution which in my judgment is the true one. Their correctness has never been questioned; and I forbear, therefore, to remark on the other cases in which this subject has been mentioned and discussed.

It may be well, however, to remark, that in analogous cases, where, by the constitution of the United States, power over a particular subject is conferred on congress without any prohibition to the States, the same rule of construction has prevailed. Thus in the case of *Houston v. Moore*, 5 Wheat. 1, it was held that the grant of power to the federal government to provide for organizing, arming, and disciplining the militia, did not preclude the States from legislating on the same subject, provided the law of the State was not repugnant to the law of congress.

The same doctrine was held in the case of *Sturges v. Crown-*

inshield, 4 Wheat. 196, under the clause in the constitution which gives to congress the power to establish uniform laws on the subject of bankruptcies throughout the United States.

And in the case of *Chirac v. Chirac*, 2 Wheat. 269, which arose under the grant of power to establish a uniform rule of naturalization, where the court speak of the power of congress as exclusive, they are evidently merely sanctioning the argument of counsel stated in the preceding sentence, which placed the invalidity of the naturalization under the law of Maryland, not solely upon the grant of power in the constitution, but insisted that the Maryland law was "virtually repealed by the constitution of the United States, and the act of naturalization enacted by congress." Undoubtedly it was so repealed, and the opposing counsel in the case did not dispute it. For the law of the United States covered every part of the Union, and there could not, therefore, by possibility, be a state law which did not come in conflict with it. . . .

Upon the whole, therefore, the law of New Hampshire is, in my judgment, a valid one. For, although the gin sold was an import from another State, and congress has clearly the power to regulate such importations, under the grant of power to regulate commerce among the several States, yet, as congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to pursue.

The judgment of the state courts ought, therefore, in my opinion, to be affirmed in each of the three cases before us.

[Justices McLEAN, CATRON, DANIEL, WOODBURY and GRIER gave separate opinions affirming the decisions of the state courts. Mr. Justice NELSON concurred in the opinions of the Chief Justice and of Mr. Justice CATRON.]

SMITH v. ALABAMA.

124 U. S. 465. (*Decided, 1888.*)

Mr. Justice MATTHEWS, after stating the case, delivered the opinion of the court.

The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several States, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority. As the regulation of commerce may consist in abstaining from prescribing positive rules for its conduct, it cannot always be said that the power to regulate is dormant because not affirmatively exercised. And when it is manifest that Congress intends to leave that commerce, which is subject to its jurisdiction, free and unfettered by any positive regulations, such intention would be contravened by state laws operating as regulations of commerce as much as though these had been expressly forbidden. In such cases, the existence of the power to regulate commerce in Congress has been construed to be not only paramount but exclusive, so as to withdraw the subject as the basis of legislation altogether from the States.

There are many cases, however, where the acknowledged powers of a State may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations. *If their operation and application in such cases regulate such commerce, so as to conflict with the regulation of the same subject by Congress, either as expressed in positive laws or implied from the absence of legislation, such legislation on the part of the State, to the extent of that conflict must be regarded as annulled.* To draw the line of interference between the two fields of jurisdiction, and to define and declare the instances of unconstitutional encroachment, is a judicial question often of much difficulty, the solution of which, perhaps, is not to be found in any single and

exact rule or decision. Such general lines of discrimination, however, have been drawn in varied and numerous decisions of this court. It has been uniformly held, for example, that the States cannot by legislation place burdens upon commerce with foreign nations or among the several States. "But upon an examination of the cases in which they were rendered," as was said in *Sherlock v. Alling*, 93 U. S. 99, 102, "it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on." In that case it was held that a statute of Indiana, giving a right of action to the personal representatives of the deceased where his death was caused by the wrongful act or omission of another, was applicable to the case of a loss of life occasioned by a collision between steamboats navigating the Ohio River engaged in interstate commerce, and did not amount to a regulation of commerce in violation of the Constitution of the United States. On this point the court said (p. 103): "General legislation of this kind, prescribing the liabilities or duties of citizens of a state, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce." . . .

The statute of Indiana held to be valid in that case was an addition to and an amendment of the general body of the law previously existing and in force regulating the relative rights and duties of persons within the jurisdiction of the State, and operating upon them, even when engaged in the business of interstate commerce. This general system of law, subject to be modified by state legislation, whether consisting in that customary law which prevails as the common law of the land in each state, or as a code of positive provisions expressly enacted, is nevertheless the law of the State in which it is administered, and derives all its force and effect from the actual or presumed exercise of its legislative power. . . .

It is among these laws of the states, therefore, that we find provisions concerning the rights and duties of common carriers of persons and merchandise, whether by land or by water, and the means authorized by which injuries resulting from the failure properly to perform their obligations may be either prevented or redressed. A carrier exercising his calling within a particular state although engaged in the business of interstate commerce, is answerable according to the laws of the State for acts of nonfeasance or misfeasance committed within its limits. If he fail to deliver goods to the proper consignee at the right time or place, he is liable to an action for damages under the laws of the State in its courts; or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, a right of action for the consequent damage is given by the local law. In neither case would it be a defense that the law giving the right to redress was void as being an unconstitutional regulation of commerce by the State. This, indeed, was the very point decided in *Sherlock v. Alling* above cited. If it is competent for the State thus to administer justice according to its own laws for wrongs done and injuries suffered, when committed and inflicted by defendants while engaged in the business of interstate or foreign commerce, notwithstanding the power over those subjects conferred upon Congress by the Constitution, what is there to forbid the State, in the further exercise of the same jurisdiction, to prescribe the precautions and safeguards foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, it is admitted the State has power to redress and punish? . . .

But for the provisions on the subject found in the local law of each State, there would be no legal obligation on the part of the carrier, whether *ex contractu* or *ex delicto*, to those who employ him; or if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by Congress or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carriers to the public or to individuals. In other words if the law of the particular State does not govern that relation, and prescribe the rights and duties which it implies, then there is and can be

no law that does until Congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the state law, which until displaced covers the subject.

There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several States each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. *Wheaton v. Peters*, 8 Pet. 591. A determination in a given case of what that law is may be different in a court of United States from that which prevails in the judicial tribunals of a particular State. This arises from the circumstance that the courts of the United States, in cases within their jurisdiction, where they are called upon to administer the law of the State in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of *Railroad Co. v. Lockwood*, 17 Wall. 357, where the common law prevailing in the State of New York, in reference to the liability of common carriers for negligence, received a different interpretation from that placed upon it by the judicial tribunals of the State; but the law as applied was none the less the law of that State.

In cases, also, arising under the *lex mercatoria*, the law merchant, by reason of its international character, this court has held itself less bound by the decisions of the state courts, than in other cases. *Swift v. Tyson*, 16 Pet. 1; *Carpenter v. Providence Washington Insurance Co.*, 16 Pet. 495; *Oates v. National Bank*, 100 U. S. 239; *Railroad Company v. National Bank*, 102 U. S. 14.

There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction

which, therefore, is gradually formed by the judgments of this court, in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority. *Moors v. United States*, 91 U. S. 270.

The statute of Alabama, the validity of which is drawn in question in this case, does not fall within this exception. It would, indeed, be competent for Congress to legislate upon its subject matter, and to prescribe the qualifications of locomotive engineers for employment by carriers engaged in foreign and interstate commerce. It has legislated upon a similar subject by prescribing the qualifications for pilots and engineers of steam vessels engaged in the coasting trade and navigating the inland waters of the United States, while engaged in commerce among the States, Rev. Stat. Tit, 52, §§ 4399-4500, and such legislation undoubtedly is justified on the ground that it is incident to the power to regulate interstate commerce.

In *Sinnot v. Davenport*, 22 How. 227, this court adjudged a law of the State of Alabama to be unconstitutional, so far as it applied to vessels engaged in interstate commerce, which prohibited any steamboat from navigating any of the waters of the State without complying with certain prescribed conditions, inconsistent with the act of Congress of February 17, 1793, in reference to the enrollment and licensing of vessels engaged in the coasting trade. In that case it was said (p. 243): "The whole commercial marine of the country is placed by the Constitution under the regulation of Congress and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power. When, therefore, an act of legislature of a State, prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the state law must give way and this without regard to the source of power whence the state legislature derived its enactment."

The power might with equal authority be exercised in prescribing the qualifications for locomotive engineers, employed by railroad companies engaged in the transportation of passengers and goods among the States, and in that case would supersede

any conflicting provisions on the same subject made by local authority.

But the provisions on the subject contained in the statute of Alabama under consideration are not regulations of interstate commerce. It is a misnomer to call them such. Considered in themselves, they are parts of that body of local law which, as we have already seen, properly governs the relation between carriers of passengers and merchandise and the public who employs them, which are not displaced until they come in conflict with express enactments of Congress in the exercise of its power over commerce, and which, until so displaced, according to the evident intention of Congress, remain as the law governing carriers in the discharge of their obligations, whether engaged in the purely internal commerce of the State, or in commerce among the States.

No objection to the statute, as an impediment to the free transaction of commerce among the States, can be found in any of its special provisions. It requires that every locomotive engineer shall have a license, but it does not limit the number of persons who may be licensed nor prescribe any arbitrary conditions to the grant. The fee of five dollars to be paid by an applicant for his examination is not a provision for raising revenue, but is no more than equivalent for the service rendered, and cannot be considered in the light of a tax or burden upon transportation. The applicant is required before obtaining his license to satisfy a board of examiners in reference to his knowledge of practical mechanics, his skill in operating a locomotive engine, and his general competency as an engineer, and the board before issuing the license is required to inquire into his character and habits, and to withhold the license if he be found to be reckless or intemperate. . . .

The statute in question further provides that any engineer licensed under the act shall forfeit his license if at any time found guilty by the board of examiners, of an act of recklessness, carelessness, or negligence while running an engine, by which damage to person or property is done, or who shall immediately preceding or during the time he is engaged in running an engine, be in a state of intoxication; and the board are authorized to revoke and cancel the license whenever they shall be satisfied of the unfitness or incompetency of the

engineer by reason of any act or habit unknown at the time of his examination, or acquired or formed subsequent to it. The eighth section of the act declares that any engineer violating its provisions shall be guilty of a misdemeanor, and upon conviction inflicts upon him the punishment of a fine not less than \$50 nor more than \$500, and also that he may be sentenced to hard labor for the county for not more than six months.

If a locomotive engineer, running an engine, as was the petitioner in this case, in the business of transporting passengers and goods between Alabama and other states, should while in that State, by mere negligence and recklessness in operating his engine, cause the death of one or more passengers carried, he might certainly be held to answer to the criminal laws of the State if they declare the offense in such a case to be manslaughter. The power to punish for the offense after it is committed certainly includes the power to provide penalties directed, as are those in the statute in question, against those acts of omission which, if performed, would prevent the commission of the larger offense.

It is to be remembered that railroads are not natural highways of trade and commerce. They are artificial creations; they are constructed within the territorial limits of a State, and by the authority of its laws, and ordinarily by means of corporations exercising their franchises by limited grants from the State.

. . . The rules prescribed for their construction, and for their management and operation designed to protect persons and property otherwise endangered by their use, are strictly within the limits of the local law. They are not *per se* regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution.

In conclusion, we find, therefore, first, that the statute of Alabama, the validity of which is under consideration, is not considered in its own nature, a regulation of interstate commerce even when applied as in the case under consideration; secondly, that it is properly an act of legislation within the scope of the admitted power reserved to the State to regulate the relative rights and duties of persons being and acting within its terri-

torial jurisdiction, intended to operate so as to secure for the public safety of person and property; and thirdly, that so far as it affects transactions of commerce among the States, it does so only indirectly, incidentally, and remotely, and not so as to burden or impede them, and, in the particulars in which it touches those transactions at all, it is not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence.

For these reasons, we hold this statute, so far as it is alleged to contravene the Constitution of the United States, to be a valid law.

The judgment of the Supreme Court of Alabama is therefore affirmed.

Mr. Justice BRADLEY dissented.

CHAPTER II

THE UNITED STATES A FEDERAL STATE.

THE CONFEDERATION OF STATES WAS REPLACED BY A NATIONAL GOVERNMENT ON THE ADOPTION OF THE CONSTITUTION, AND CITIZENS OF EACH STATE BECAME CITIZENS OF THE UNITED STATES.*

COHENS v. THE STATE OF VIRGINIA.

Reported in 6 Wheat. 264. (1821.)

Heard on motion to dismiss writ of error. Motion denied.

[The statement of the facts is omitted as they are to be found in the opinion.]†

MARSHALL, C. J., delivered the opinion of the court.

This is a writ of error to a judgment rendered in the court of Hustings, for the borough of Norfolk, on an information for selling lottery tickets contrary to an act of the legislature of Virginia. In the state court, the defendant claimed the protection of an act of Congress. A case was agreed between the parties, which states the act of assembly on which the prosecution was founded, and the act of Congress on which the defendant relied, and concludes in these words: "If upon this case the court shall be of the opinion that the acts of Congress before mentioned were valid, and, on the true construction of those acts, the lottery tickets sold by the defendant as aforesaid, might lawfully be sold within the State of Virginia, notwithstanding the act or statute of the general assembly of Virginia prohibiting such sale, then judgment to be entered for the defendants. And if the court should be of opinion that the statute or act of the general assembly of the State of Virginia, prohibiting such sale, is valid, notwithstanding said acts of Congress, then judg-

* See Section 81, Vol. 2, Cyclopædia of Law.

† This case was argued on the merits by Ogden and Pinkney for Plaintiff and by Webster for Defendant.

ment to be entered that the defendants are guilty, and that the commonwealth recover against them one hundred dollars and costs."

Judgment was rendered against the defendants; and the court in which it was rendered being the highest court of the State in which the cause was cognizable, the record has been brought into this court by writ of error.

The defendant in error moves to dismiss this writ, for want of jurisdiction.

In support of this motion, three points have been made, and argued with the ability which the importance of the question merits. These points are:

1. That a State is a defendant.
2. That no writ of error lies from this court to a state court.
3. The third point has been presented in different forms by the gentlemen who have argued it. The counsel who opened the cause said that the want of jurisdiction was shown by the subject-matter of the case. The counsel who followed him said that jurisdiction was not given by the Judiciary Act. The court has bestowed all its attention on the arguments of both gentlemen, and supposes that their tendency is to show that this court has no jurisdiction of the case, or, in other words, has no right to review the judgment of the state court, because neither the constitution nor any law of the United States has been violated by that judgment.

The questions presented to the court by the first two points made at the bar are of great magnitude, and may be truly said vitally to affect the Union. They exclude the inquiry whether the constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review; and maintain that, admitting such violation, it is not in the power of the government to apply a corrective. They maintain that the nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made, by a part, against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exer-

cised in the last resort by the courts of every State in the Union. That the constitution, laws, and treaties, may receive as many constructions as there are States; and that this is not a mischief, or, if a mischief, is irremediable. These abstract propositions are to be determined; for he who demands decision without permitting inquiry, affirms that the decision he asks does not depend on inquiry.

If such be the constitution, it is the duty of the court to bow with respectful submission to its provisions. If such be not the constitution, it is equally the duty of this court to say so; and to perform that task which the American people have assigned to the judicial department.

1. The first question to be considered is, whether the jurisdiction of this court is excluded by the character of the parties, one of them being a State, and the other a citizen of that State?

The 2d section of the third article of the constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends "all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." This clause extends the jurisdiction of the court to all cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article.

In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended "controversies between two or more States, between a State and citizens of another State," "and between a State and foreign states, citizens, or subjects." If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union. . . .

The jurisdiction of the court, then, being extended by the letter of the constitution to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw any case of this description from that jurisdiction, must sustain the exemption they claim on the spirit and true

meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed.

The counsel for the defendant in error have undertaken to do this; and have laid down the general proposition, that a sovereign independent State is not suable, except by its own consent.

This general proposition will not be controverted. But its consent is not requisite in each particular case. It may be given in a general law. And if a State has surrendered any portion of its sovereignty, the question whether a liability to suit be a part of this portion, depends on the instrument by which the surrender is made. If upon a just construction of that instrument, it shall appear that the State has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has intrusted that power to a tribunal in whose impartiality it confides.

The American States, as well as the American people, have believed a close and firm Union to be essential to their liberty and to their happiness. They have been taught by experience, that this Union cannot exist without a government for the whole; and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent States. Under the influence of this opinion, and thus instructed by experience, the American people, in the conventions of their respective States, adopted the present constitution.

If it could be doubted whether, from its nature, it were not supreme in all cases where it is empowered to act, that doubt would be removed by the declaration that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

This is the authoritative language of the American people; and, if gentlemen please, of the American States. It marks with lines too strong to be mistaken, the characteristic distinction between the government of the Union and those of the States.

The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution; and if there be any who deny its necessity, none can deny its authority.

To this supreme government ample powers are confided; and if it were possible to doubt the great purposes for which they were so confided, the people of the United States have declared that they are given "in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity."

With the ample powers confided to this supreme government, for these interesting purposes, are connected many express and important limitations on the sovereignty of the States, which are made for the same purposes. The powers of the Union on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the States; but in addition to these, the sovereignty of the States is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed is the judicial department. It is authorized to decide all cases, of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a State may be a party. When we consider the situation of the government of the Union and of a State, in relation to each other; the nature of our constitution, the subordination of the state governments to the constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States is confided to the judicial department, are we at liberty to insert in this general grant, an exception of those cases in which a State may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of

the United States, is cognizable in the courts of the Union, whoever may be the parties to that case. . . .

It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. In doing this on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one. . . .

We think, then, that as the Constitution originally stood, the appellate jurisdiction of this court, in all cases arising under the constitution, laws, or treaties of the United States, was not arrested by the circumstance that a State was a party.

This leads to a consideration of the 11th amendment.

It is in these words: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State."

It is a part of our history, that, at the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or

more States, or between a State and a foreign state. The jurisdiction of the court still extends to these cases; and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States.

The first impression made on the mind by this amendment is, that it was intended for those cases, and for those only, in which some demand against a State is made by an individual in the courts of the Union. If we consider the causes to which it is to be traced, we are conducted to the same conclusion. A general interest might well be felt in leaving to a State full power of consulting its convenience in the adjustment of its debts, or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts, as to strip the government of the means of protecting, by the instrumentality of its courts, the constitution and laws from active violation.

. . .

Under the Judiciary Act,* the effect of a writ of error is simply to bring the record into court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record. It removes the record into the supervising tribunal. Where, then, a State obtains a judgment against an individual, and the court rendering such judgment overrules a defense set up under the constitution or laws of the United States, the transfer of this record into the supreme court for the sole purpose of inquiring whether the judgment violates the constitution of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the State whose judgment is so far re-

* 1 Stats. at Large, 73.

examined. Nothing is demanded from the State. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything. . . . He only asserts the constitutional right to have his defense examined by that tribunal whose province it is to construe the constitution and laws of the Union. . . .

The point of view in which this writ of error, with its citation, has been considered uniformly in the courts of the Union, has been well illustrated by a reference to the courts of this court in suits instituted by the United States. The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the Judiciary Act does not authorize such suits. Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States into a superior court, where they have, like those in favor of an individual, been re-examined, and affirmed or reversed. It has never been suggested that such a writ of error was a suit against the United States, and therefore not within the jurisdiction of the appellate court.

It is, then, the opinion of the court, that the defendant who removes a judgment rendered against him by a state court into this court, for the purpose of re-examining the question whether that judgment be a violation of the constitution or laws of the United States, does not commence or prosecute a suit against the State, whatever may be its opinion where the effect of the writ may be to restore the party to the possession of a thing which he demands.

2. The second objection to the jurisdiction of the court is, that its appellate power cannot be exercised, in any case, over the judgment of a state court.

This objection is sustained chiefly by arguments drawn from the supposed total separation of the judiciary of a State from that of the Union, and their entire independence of each other. The argument considers the federal judiciary as completely foreign to that of a State; and as being no more connected with it in any respect whatever, than the court of a foreign State. If this hypothesis be just, the argument founded on it is equally so; but if the hypothesis be not supported by the constitution, the argument fails with it.

This hypothesis is not founded on any words in the constitu-

tion, which might seem to countenance it, but on the unreasonableness of giving a contrary construction to words which seem to require it; and on the incompatibility of the application of the appellate jurisdiction to the judgments of state courts, with that constitutional relation which subsists between the government of the Union and the governments of those States which compose it.

Let this unreasonableness, this total incompatibility, be examined.

That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests, in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a State, so far as they are repugnant to the constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire,—for some purposes sovereign, for some purposes subordinate.

In a government so constituted, is it unreasonable that the judicial power should be competent to give efficacy to the constitutional laws of the legislature? That department can decide on the validity of the constitution or law of a State, if it be repugnant to the constitution or to a law of the United States. Is it unreasonable that it should also be empowered to decide on the judgment of a state tribunal enforcing such unconstitutional law? Is it so very unreasonable as to furnish a justification for controlling the words of the constitution?

We think it is not. We think that in a government acknowledgedly supreme, with respect to objects of vital interest to the

nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment. The exercise of the appellate power over those judgments of the state tribunals which may contravene the constitution or laws of the United States, is, we believe, essential to the attainment of those objects.

The propriety of intrusting the construction of the constitution, and laws made in pursuance thereof, to the judiciary of the Union, has not, we believe, as yet, been drawn into question. It seems to be a corollary from this political axiom, that the federal courts should either possess exclusive jurisdiction in such cases, or a power to revise the judgments rendered in them by the state tribunals. If the federal and state courts have concurrent jurisdiction in all cases arising under the constitution, laws, and treaties of the United States; and if a case of this description brought in a state court cannot be removed before judgment, nor revised after judgment, then the construction of the constitution, laws, and treaties of the United States is not confided particularly to their judicial department, but is confided equally to that department and to the state courts, however they may be constituted. "Thirteen independent courts," says a very celebrated statesman (and we have now more than twenty such courts), "of final jurisdiction over the same causes, arising upon the same laws, is a hydra of government, from which nothing but contradiction and confusion can proceed."

Dismissing the unpleasant suggestion, that any motives which may not be fairly avowed, or which ought not to exist, can ever influence a State or its courts, the necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved.

We are not restrained, then, by the political relations between the general and state governments, from construing the words of the constitution, defining the judicial power, in their true sense. We are not bound to construe them more restrictively than they naturally import.

They give to the supreme court appellate jurisdiction in all cases arising under the constitution, laws, and treaties of the

United States. The words are broad enough to comprehend all cases of this description, in whatever court they may be decided. . . . Let the nature and objects of our Union be considered; let the great fundamental principles on which the fabric stands be examined; and we think the result must be that there is nothing so extravagantly absurd in giving to the court of the nation the power of revising the decisions of local tribunals, on questions which affect the nation, as to require that words which import this power should be restricted by a forced construction.

. . .

Motion Denied.

The cause was thereupon argued on the merits. . . .

Judgment Affirmed.

MINOR v. HAPPERSETT.

Reported in 21 Wallace 162. Decided 1874.

The Chief Justice delivered the opinion of the court.

The question is presented in this case, whether, since the adoption of the fourteenth amendment, a woman, who is a citizen of the United States and of the State of Missouri, is a voter in that State, notwithstanding the provision of the constitution and laws of the State, which confine the right of suffrage to men alone. We might, perhaps, decide the case upon other grounds, but this question is fairly made. From the opinion we find that it was the only one decided in the court below, and it is the only one which has been argued here. The case was undoubtedly brought to this court for the sole purpose of having that question decided by us, and in view of the evident propriety there is of having it settled, so far as it can be by such a decision, we have concluded to waive all other considerations and proceed at once to its determination.

It is contended that the provisions of the constitution and laws of the State of Missouri which confine the right of suffrage and registration therefor to men, are in violation of the Constitution of the United States, and therefore void. The argument is, that as a woman, born or naturalized in the United States and subject to the jurisdiction thereof, is a citizen of the United

States and of the State in which she resides, she has the right of suffrage as one of the privileges and immunities of her citizenship which the State cannot by its laws or constitution abridge.

There is no doubt that women may be citizens. They are persons and by the fourteenth amendment, "All persons born or naturalized in the United States and subject to the jurisdiction thereof" are expressly declared to be "citizens of the United States and of the State wherein they reside." But, in our opinion, it did not need this amendment to give them that position. Before its adoption the Constitution of the United States did not in terms prescribe who should be the citizens of the United States or of the several States, yet there were necessarily such citizens without such provision. There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.

For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words "subject," "inhabitant," and "citizen" have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly employed, however, and as it has been considered better suited to the descriptions of one living under a republican government it was adopted by nearly all of the States upon their separation from Great Britain, and was afterwards adopted in the Articles of Confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more.

To determine, then, who were citizens of the United States before the adoption of the amendment it is necessary to ascertain what persons originally associated themselves together to form the nation, and what were afterwards admitted to membership.

Looking at the Constitution itself we find that it was or-

dained and established by "the people of the United States,"* and then going further back, we find that these were the people of the several States that had before dissolved the political bands which connected them with Great Britain and assumed a separate and equal station among the powers of the earth, and that had by Articles of Confederation and Perpetual Union, in which they took the name of "the United States of America," entered into a firm league of friendship with each other for their common defence, the security of their liberties and their mutual and general welfare, binding themselves to assist each other against all force offered to or attack made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.**

Whoever, then, was one of the people of either of these States, when the Constitution of the United States was adopted, became *ipso facto* a citizen—a member of the nation created by its adoption. He was one of the persons associating together to form the nation, and was, consequently one of its original citizens. As to this there has never been a doubt. Disputes have arisen as to whether or not certain persons or certain classes of persons were part of the people at the time, but never as to their citizenship if they were.

Additions might always be made to the citizenship of the United States in two ways; first, by birth, and second, by naturalization. This is apparent from the Constitution itself, for it provides† that "no person except a natural-born citizen or a citizen of the United States at the time of the adoption of the Constitution, shall be eligible to the office of President,"‡ and that Congress shall have power to "establish a uniform rule of naturalization." Thus new citizens may be born or they may be created by naturalization. . . .

It is sufficient for everything we have now to consider that all children born of citizen parents within the jurisdiction are themselves citizens. The words "all children" are certainly as comprehensive, when used in this connection, as "all persons," and if females are included in the last they must be in the first.

*Preamble.

** Articles of Confederation, § 3; 1 Stat. at Large, 4.

† Article 8, Section 1.

‡ Article 1, Section 8.

That they are included in the last is not denied. In fact the whole argument of the plaintiff proceeds upon that idea.

Under the power to adopt a uniform system of naturalization Congress, as early as 1790 provided "that any alien, being a free white person," might be admitted as a citizen of the United States and that the children of such persons so naturalized, dwelling within the United States, being under twenty-one years of age at the time of such naturalization, should also be considered citizens of the United States, and that the children of citizens of the United States that might be born beyond the sea, or out of the limits of the United States, should be considered as natural-born citizens.* . . .

As early as 1804 it was enacted by Congress that when any alien who had declared his intention to become a citizen in the manner provided by law died before he was actually naturalized his widow and children should be considered as citizens of the United States, and entitled to all rights and privileges as such upon taking the necessary oath**; and in 1855 it was further provided that any woman who might lawfully be naturalized under the existing laws, married, or who should be married to a citizen of the United States should be deemed and taken to be a citizen. †

From this it is apparent that from the commencement of the legislation upon this subject alien women and alien minors could be made citizens by naturalization, and we think it will not be contended that this would have been done if it had not been supposed that native women and native minors were already citizens by birth.

But if more is necessary to show that women have always been considered as citizens the same as men, abundant proof is to be found in the legislation and judicial history of the country. . . .

In the legislative department of the government similar proof will be found. Thus, in the pre-emption laws, ‡ a widow "being a citizen of the United States," is allowed to make settlement on the public lands and purchase upon the terms specified and

* 1 Stat. at Large, 103.

** 2 Stat. at Large, 293.

† 10 Stat. at Large, 604.

‡ 5 Stat. at Large, 455, § 10.

women, "being citizens of the United States" are permitted to avail themselves of the benefit of the homestead law.*

Other proof of like character might be found, but certainly more cannot be necessary to establish the fact that sex has never been made one of the elements of citizenship in the United States. In this respect men have never had an advantage over women. The same laws precisely apply to both. The fourteenth amendment did not affect the citizenship of women any more than it did of men. In this particular, therefore, the rights of Mrs. Minor do not depend upon the amendment. She has always been a citizen from her birth, and entitled to all the privileges and immunities of citizenship. The amendment prohibited the State of which she is a citizen from abridging any of her privileges and immunities as a citizen of the United States; but it did not confer citizenship upon her. That she had before its adoption.

If the right of suffrage is one of the necessary privileges of a citizen of the United States, then the constitution and laws of Missouri confining it to men are in violation of the Constitution of the United States, as amended, and consequently void. The direct question is, therefore, presented whether all citizens are necessarily voters.

The Constitution does not define the privileges and immunities of citizens. For that definition we must look elsewhere. In this case we need not determine what they are but only whether suffrage is necessarily one of them.

It certainly is nowhere made so in express terms. The United States has no voters in the States of its own creation. The elective officers of the United States are all elected directly or indirectly by State voters. . . .

The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the constitution and laws of the State, but it operates for this purpose, if at all, through the States and the State law and not directly upon the citizen.

* 12 Stat. at Large, 392.

It is clear, therefore, we think, that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted. This makes it proper to inquire whether suffrage was coextensive with the citizenship of the States at the time of its adoption. If it was then it may with force be argued that suffrage was one of the rights which belonged to citizenship, and in the enjoyment of which every citizen must be protected. But if it was not, the contrary may with propriety be assumed.

When the Federal Constitution was adopted, all the States with the exception of Rhode Island and Connecticut, had constitutions of their own. These two continued to act under their charters from the Crown. Upon an examination of these constitutions we find that in no State were all citizens permitted to vote. . . .

In this condition of the law in respect to suffrage in the several States it cannot for a moment be doubted that if it had been intended to make all citizens of the United States voters, the framers of the Constitution would not have left it to implication. So important a change in the condition of citizenship as it actually existed, if intended, would have been expressly declared.

But if further proof is necessary to show that no such change was intended, it can easily be found both in and out of the Constitution. By Article 4, Section 2, it is provided that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." If suffrage is necessarily a part of citizenship, then the citizens of each State must be entitled to vote in the several States precisely as their citizens are. This is more than asserting that they may change their residence and become citizens of the State and thus be voters. It goes to the extent of insisting that while retaining their original citizenship they may vote in any State. This, we think, has never been claimed. And again, by the very terms of the amendment we have been considering (the fourteenth), "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for the President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State,

or the members of the legislature thereof, is denied to any of the male inhabitants of such State being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crimes, the basis of representation, therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." Why this, if it was not in the power of the legislature to deny the right of suffrage to some male inhabitants? And if suffrage was necessarily one of the absolute rights of citizenship, why confine the operation of the limitation to male inhabitants? Women and children are, as we have seen, "persons." They are counted in the enumeration upon which the apportionment is to be made, but if they were necessarily voters because of their citizenship unless clearly excluded, why inflict the penalty for the exclusion of males alone? Clearly, no such form of words would have been selected to express the idea here indicated if suffrage was the absolute right of all citizens.

As has been seen, all the citizens of the States were not invested with the right of suffrage. In all, save perhaps New Jersey, this right was only bestowed upon men and not upon all of them. Under these circumstances it is certainly now too late to contend that a government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters.

The same may be said of the other provisions just quoted. Women were excluded from suffrage in nearly all the States by the express provision of their constitution and laws. If that had been equivalent to a bill of attainder, certainly its abrogation would not have been left to implication. Nothing less than express language would have been employed to effect so radical a change. So also of the amendment which declares that no person shall be deprived of life, liberty, or property without due process of law, adopted as it was as early as 1791. If suffrage was intended to be included within its obligations, language better adapted to express that intent would most certainly have been employed. The right of suffrage, when granted, will be protected. He who has it can only be deprived of it, by due process of law, but in order to claim protection he must first show that he has the right. . . .

Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship did not necessarily confer the right of suffrage.

If uniform practice long continued can settle the construction of so important an instrument as the constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be.

We have given this case the careful consideration its importance demands. If the law is wrong, it ought to be changed; but the power for that is not with us. The arguments addressed to us bearing upon such a view of the subject may perhaps be sufficient to induce those having the power to make the alteration, but they ought not to be permitted to influence our judgment in determining the present rights of the parties now litigating before us. No argument as to the women's need of suffrage can be considered. We can only act upon her rights as they exist. It is not for us to look at the hardship of withholding. Our duty is at an end if we find it is within the power of a State to withhold.

Being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one, and that the Constitutions and laws of the several States, which commit that important trust to men alone, are not necessarily void, we

Affirm the judgment.

THE CONSTITUTION MAKES THE UNION A LEGAL FEDERAL STATE.*
JURISDICTION OF FEDERAL COURTS.

MARTIN, Heir at Law and Devisee of Fairfax, v. HUNTER'S
LESSEE.

Reported in 1 Wheat. 304. (1816.)

[The facts may be gleaned from the opinion of the court.]

STORY, J., delivered the opinion of the court.

This is a writ of error from the court of appeals of Virginia,

* See, Sections 81-93, Vol. 2, Cyclopedia of Law.

founded upon the refusal of that court to obey the mandate of this court, requiring the judgment rendered in this very cause, at February term, 1813, to be carried into due execution. The following is the judgment of the court of appeals rendered on the mandate:

"The court is unanimously of opinion, that the appellate power of the Supreme Court of the United States does not extend to this Court, under a sound construction of the Constitution of the United States; that so much of the 25th section of the act of congress to establish the judicial courts of the United States, as extends the appellate jurisdiction of the supreme court to this court, is not in pursuance of the Constitution of the United States; that the writ of error in this cause was improvidently allowed under the authority of that act; that the proceedings thereon in the supreme court were *coram non jndice*, in relation to this court, and that obedience to its mandate be declined by the court." . . .

Before proceeding to the principal question, it may not be unfit to dispose of some preliminary considerations which have grown out of the arguments at the bar.

The constitution of the United States was ordained and established, not by the States in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by "the people of the United States." There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be, that the people had a right to prohibit to the States the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. The constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions, for the powers of the States depend upon their own constitutions; and the people of every State had the right to modify and restrain them, according to their own views of policy or principle. On the other hand it is perfectly clear that the sovereign powers

vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognized by one of the articles in amendment of the constitution, which declares that "the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The government, then, of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication. . . .

With these principles in view, principles in respect to which no difference of opinion ought to be indulged, let us now proceed to the interpretation of the constitution, so far as regards the great points in controversy.

The third article of the constitution is that which must principally attract our attention. . . .

This leads us to the consideration of the great question as to the nature and extent of the appellate jurisdiction of the United States. We have already seen that appellate jurisdiction is given by the constitution to the supreme court in all cases where it has not original jurisdiction, subject, however to such exceptions and regulations as congress may prescribe. It is, therefore, capable of embracing every case enumerated in the constitution, which is not exclusively to be decided by way of original jurisdiction. But the exercise of appellate jurisdiction is far from being limited by the terms of the constitution to the supreme court. There can be no doubt that congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the constitution in the most general terms, and may, therefore, be exercised by congress under every variety of form, of appellate or original jurisdiction. And as there is nothing in the constitution which restrains or limits this power, it must, therefore, in all other cases, subsist in the utmost latitude of which, in its own nature, it is susceptible.

As, then, by the terms of the constitution, the appellate jurisdiction is not limited as to the supreme court, and as to this court

it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over state tribunals in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular courts. The words are, "the judicial power (which includes appellate power) shall extend to all cases," etc., and "in all other cases before mentioned the supreme court shall have appellate jurisdiction." It is the case, then, and not the court, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the constitution for any qualifications as to the tribunal where it depends. It is incumbent, then, upon those who assert such a qualification to show its existence by necessary implication. If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible.

If the constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, it would necessarily follow that the jurisdiction of these courts would, in all the cases enumerated in the constitution, be exclusive of state tribunals. How otherwise could the jurisdiction extend to all cases arising under the constitution, laws, and treaties of the United States, or to all cases of admiralty and maritime jurisdiction? If some of these cases might be entertained by state tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to all, but to some, cases. If state tribunals might exercise concurrent jurisdiction over all or some of the other classes of cases in the constitution without control, then the appellate jurisdiction of the United States, might, as to such cases, have no real existence, contrary to the manifest intent of the constitution. Under such circumstances, to give effect to the judicial power, it must be construed to be exclusive; and this not only when the *casus fœderis* should arise directly, but when it should arise incidentally, in cases pending in state courts. This construction would abridge the jurisdiction of such court far more than has been ever contemplated in any act of congress.

On the other hand, if, as has been contended, a discretion be vested in congress to establish, or not to establish, inferior courts at their own pleasure, and congress should not establish such courts, the appellate jurisdiction of the supreme court would

have nothing to act upon, unless it could act upon cases pending in the state courts. Under such circumstances, it must be held that the appellate power would extend to state courts; for the constitution is peremptory that it shall extend to certain enumerated cases, which cases could exist in no other courts. Any other construction, upon this supposition, would involve this strange contradiction, that a discretionary power vested in congress, and which they might rightfully omit to exercise, would defeat the absolute injunctions of the constitution in relation to the whole appellate power.

But it is plain that the framers of the constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction. With this view the sixth article declares, that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution, or laws of any State to the contrary notwithstanding." It is obvious that this obligation is imperative upon the state judges in their official, and not merely in their private, capacities. From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or constitution of the State, but according to the constitution, laws, and treaties of the United States, "the supreme law of the land."

A moment's consideration will show us the necessity and propriety of this provision in cases where the jurisdiction of the state courts is unquestionable. Suppose a contract for the payment of money is made between citizens of the same State, and performance thereof is sought in the courts of that State; no person can doubt that the jurisdiction completely and exclusively attaches, in the first instance, to such courts. Suppose, at the trial, the defendant sets up in his defense a tender under a state law, making paper money a good tender, or a state law, impairing the obligation of such contract, which law, if binding, would defeat the suit. The constitution of the United States has declared that no State shall make anything but gold or silver coin

a tender in payment of debts, or pass a law impairing the obligation of contracts. If congress shall not have passed a law providing for the removal of such a suit to the courts of the United States, must not the state court proceed to hear and determine it? Can a mere plea in defense be of itself a bar to further proceedings, so as to prohibit an inquiry into its truth or legal propriety, when no other tribunal exists to whom judicial cognizance of such cases is confided? Suppose an indictment for a crime in a state court, and the defendant should allege in his defense that the crime was created by an *ex post facto* act of the State, must not the state court, in the exercise of a jurisdiction which has already rightfully attached, have a right to pronounce on the validity and sufficiency of the defense? It would be extremely difficult, upon any legal principles, to give a negative answer to these inquiries. Innumerable instances of the same sort might be stated in illustration of the position; and unless the state courts could sustain jurisdiction in such cases, this clause of the sixth article would be without meaning or effect, and public mischiefs, of a most enormous magnitude, would inevitably ensue.

It must, therefore, be conceded that the constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the constitution, is to extend. It cannot extend by original jurisdiction if that was already rightfully and exclusively attached in the state courts, which (as has been already shown) may occur; it must therefore extend by appellate jurisdiction, or not at all. It would seem to follow that the appellate power of the United States must, in such cases, extend to state tribunals; and if in such cases, there is no reason why it should not equally attach upon all others within the purview of the constitution.

It has been argued that such an appellate jurisdiction over state courts is inconsistent with the genius of our governments, and the spirit of the constitution. That the latter was never designed to act upon state sovereignties, but only upon the people, and that, if the power exists, it will materially impair the

sovereignty of the States, and the independence of their courts. We cannot yield to the force of this reasoning; it assumes principles which we cannot admit, and draws conclusions to which we do not yield our assent.

It is a mistake that the constitution was not designed to operate upon States, in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the States in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the States. Surely, when such essential portions of state sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted that the constitution does not act upon the States. The language of the constitution is also imperative upon the States, as to the performance of many duties. It is imperative upon the state legislatures to make laws prescribing the time, places, and manner of holding elections for senators and representatives, and for electors of president and vice-president. And in these, as well as in some other cases, congress have a right to revise, amend, or supersede the laws which may be passed by state legislatures. When, therefore, the States are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the legislatures of the States are, in some respects, under the control of congress, and in every case are, under the constitution, bound by the paramount authority of the United States; it is certainly difficult to support the argument that the appellate power over the decisions of state courts is contrary to the genius of our institutions. The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the States, and if they are found to be contrary to the constitution, may declare them to be of no legal validity. Surely, the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.

Nor can such a right be deemed to impair the independence of state judges. It is assuming the very ground in controversy to assert that they possess an absolute independence of the United States. In respect to the powers granted to the United States, they are not independent; they are expressly bound to obedience by the letter of the constitution; and if they should unintention-

ally transcend their authority, or misconstrue the constitution, there is no more reason for giving their judgments an absolute and irresistible force, than for giving it to the acts of the other co-ordinate departments of state sovereignty. . . .

On the whole, the court are of opinion, that the appellate power of the United States does extend to cases pending in the state courts; and that the 25th section of the Judiciary Act, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the constitution. We find no clause in that instrument which limits this power; and we dare not interpose a limitation where the people have not been disposed to create one.

Strong as this conclusion stands upon the general language of the constitution, it may still derive support from other sources. It is an historical fact, that this exposition of the constitution, extending its appellate power to state courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the state conventions. It is an historical fact, that at the time when the Judiciary Act was submitted to the deliberations of the first congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It is an historical fact, that the supreme court of the United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important States in the Union, and that no state tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the supreme court, until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence of enlightened state courts, and these judicial decisions of the supreme court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubts. . . .

It is the opinion of the whole court, that the judgment of the court of appeals of Virginia, rendered on the mandate in

this cause, be reversed, and the judgment of the district court, held at Winchester, be, and the same is hereby affirmed.

[Mr. Justice JOHNSON delivered a concurring opinion.]

THE UNITED STATES IS SUPREME WITHIN THE POWERS CONFERRED;
POWERS NOT CONFERRED ARE WITHHELD TO THE STATES.*

UNITED STATES v. CRUICKSHANK.

92 United States, 542. 1875.

Mr. Chief Justice WAITE delivered the opinion of the court.

This case comes here with a certificate by the judges of the Circuit Court for the District of Louisiana that they were divided in opinion upon a question which occurred at the hearing. It presents for our consideration an indictment containing sixteen counts, divided into two series of eight counts each, based upon sect. 6 of the Enforcement Act of May 31, 1870. That section is as follows:

“That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States, or because of his having exercised the same, such person shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court,—the fine not to exceed \$5,000, and the imprisonment not to exceed ten years; and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the constitution or laws of the United States.” 16 Stat. 141.

The question certified arose upon a motion in arrest of judgment after a verdict of guilty generally upon the whole sixteen counts, and is stated to be, whether “the said sixteen counts of

* See, Secs. 83-88, Vol. 2, Cyclopedia of Law series; also *Calder v. Bull*, *post*, page 248.

said indictment are severally good and sufficient in law, and contain charges of criminal matter indictable under the laws of the United States."

The general charge in the first eight counts is that of "banding," and in the second eight, that of "conspiring" together to injure, oppress, threaten, and intimidate Levi Nelson and Alexander Tillman, citizens of the United States, of African descent and persons of color, with the intent thereby to hinder and prevent them in their free exercise and enjoyment of rights and privileges "granted and secured" to them "in common with all other good citizens of the United States by the constitution and laws of the United States."

The offenses provided for by the statute in question do not consist in the mere "banding" or "conspiring" of two or more persons together, but in their banding or conspiring with the intent, or for any of the purposes, specified. To bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the constitution or laws of the United States. If it does not so appear, the criminal matter charged has not been made indictable by any act of Congress.

We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other. *Slaughter-House Cases*, 16 Wall. 74.

Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. In the formation of a government, the people may confer upon it such powers as they choose. The government, when so formed, may, and when called upon should, exercise all the powers it has for the protection of

the rights of its citizens and the people within its jurisdiction; but it can exercise no other. The duty of a government to afford protection is limited always by the power it possesses for that purpose.

Experience made the fact known to the people of the United States that they required a national government for national purposes. The separate governments of the separate States, bound together by the articles of confederation alone, were not sufficient for the promotion of the general welfare of the people in respect to foreign nations, or for their complete protection as citizens of the confederated States. For this reason, the people of the United States, "in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty" to themselves and their posterity (Const. Preamble), ordained and established the government of the United States, and defined its powers by a Constitution, which they adopted as its fundamental law, and made its rule of action.

The government thus established and defined is to some extent a government of the States in their political capacity. It is also, for certain purposes, a government of the people. Its powers are limited in number, but not in degree. Within the scope of its powers, as numerated and defined, it is supreme and above the States; but beyond, it has no existence. It was erected for special purposes, and endowed with all the powers necessary for its own preservation and the accomplishment of the ends its people had in view. It can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction.

The people of the United States resident within any State are subject to two governments: one State, and the other National; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. Thus, if a marshal of the United States is

unlawfully resisted while executing the process of the courts within a State, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by the resistance, and that of the State by the breach of peace, in the assault. So, too, if one passes counterfeit coin of the United States within a State, it may be an offense against the United States and the State: the United States, because it discredits the coin; and the State, because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments possess powers in common, or bring them into conflict with each other. It is the natural consequence of a citizenship which owes allegiance to two sovereignties, and claims protection from both. The citizen cannot complain, because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return, he can demand protection from each within its own jurisdiction.

The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States.

We now proceed to an examination of the indictment, to ascertain whether the several rights, which it is alleged the defendants intended to interfere with, are such as had been in law and in fact granted or secured by the Constitution or laws of the United States.

The first and ninth counts state the intent of the defendants to have been to hinder and prevent the citizens named in the free exercise and enjoyment of their "lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose." The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It "derives

its source," to use the language of Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 211, "from those laws whose authority is acknowledged by civilized man throughout the world." It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection. As no direct power over it was granted to Congress, it remains, according to the ruling in *Gibbons v. Ogden*, id. 203, subject to State jurisdiction. Only such existing rights were committed by the people to the protection of Congress as came within the general scope of the authority granted to the national government.

The first amendment to the Constitution prohibits Congress from abridging "the right of the people to assemble and to petition the government for a redress of grievances." This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone. *Barron v. The City of Baltimore*, 7 Pet. 250; *Lessee of Livingston v. Moore*, id. 551; *Fox v. Ohio*, 5 How. 434; *Smith v. Maryland*, 18 id. 76; *Withers v. Buckley*, 20 id. 90; *Pervear v. The Commonwealth*, 5 Wall. 479; *Twitchell v. The Commonwealth*, 7 id. 321; *Edwards v. Elliott*, 21 id. 557. It is now too late to question the correctness of this construction. As was said by the late Chief Justice in *Twitchell v. The Commonwealth*, 7 Wall. 325, "the scope and application of these amendments are no longer subjects of discussion here." They left the authority of the States just where they found it, and added nothing to the already existing powers of the United States.

The particular amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States.

The right of the people peaceably to assemble for the purpose

of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case. The offense, as stated in the indictment, will be made out, if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever.

The second and tenth counts are equally defective. The right there specified is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called, in *The City of New York v. Miln*, 11 Pet. 139, the "powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police," "not surrendered or restrained" by the Constitution of the United States.

The third and eleventh counts are even more objectionable. They charge the intent to have been to deprive the citizens named, they being in Louisiana, "of their respective several lives and liberty of person without due process of law." This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the State of Louisiana. The rights of life and personal liberty are natural rights of man. "To secure these rights," says the Declaration of Independence, "governments are instituted among men, deriving their just powers from the consent of the governed." The very highest duty of the States,

when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these "unalienable rights with which they were endowed by their Creator." Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.

The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. As was said by Mr. Justice Johnson, in *Bank of Columbia v. Okely*, 4 Wheat. 244, it secures "the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." These counts in the indictment do not call for the exercise of any of the powers conferred by this provision in the amendment.

The fourth and twelfth counts charge the intent to have been to prevent and hinder the citizens named, who were of African descent and persons of color, in "the free exercise and enjoyment of their several right and privilege to the full and equal benefit of all laws and proceedings, then and there, before that time, enacted or ordained by the said State of Louisiana and by the United States; and then and there, at that time, being in force in the said State and District of Louisiana aforesaid, for the security of their respective persons and property, then and there, at that time enjoyed at and within said State and District of Louisiana by white persons, being citizens of said State of Louisiana and the United States, for the protection of the persons and property of said white citizens." There is no allegation that this was done because of the race or color of the persons conspired against. When stripped of its verbiage, the case as presented amounts to nothing more than that the defendants conspired to prevent certain citizens of the United States, being within the State of Louisiana, from enjoying the equal protection of the laws of the State and of the United States.

The fourteenth amendment prohibits a State from denying to

any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.

[The sufficiency of the counts of the indictment are next considered and they are held to be insufficient under the principles stated or too vague and uncertain to charge a crime.]

*The order of the Circuit Court arresting the judgment upon the verdict is, therefore, affirmed; and the cause remanded, with instructions to discharge the defendants.**

JURISDICTION OF FEDERAL COURT.

PURPOSE OF THE CONSTITUTION WAS TO MAKE THE PEOPLE OF THE UNITED STATES INTO A NATION.†

CHISHOLM, EXECUTOR, v. GEORGIA.

Reported in 2 Dallas, 419. (1793.)

[Chisholm, executor, brought an action of assumpsit against the State of Georgia. Return having been made, Attorney-General Randolph moved that unless the State of Georgia should cause an appearance to be made in its behalf, judgment should be entered against the said State and a writ of inquiry of damages be awarded. When the case came before the court for consideration, the counsel for the State of Georgia made a protest in writing against the court's taking jurisdiction of the case,

* Mr. Justice CLIFFORD dissented.

† See, Sec. 94, Vol. 2, Cyclopedia of Law.

but declined to take any part in arguing the question. The judges delivered their opinions *seriatim*.]†

WILSON, J. This is a case of uncommon magnitude. One of the parties to it is a State; certainly respectable, claiming to be sovereign. The question to be determined is, whether this State, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the Supreme Court of the United States? This question, important in itself, will depend on others more important still; and may perhaps be ultimately resolved into one no less radical than this—"Do the people of the United States form a Nation?"

A cause so conspicuous and interesting, should be carefully and accurately viewed from every possible point of sight. I shall examine it, 1st. By the principles of general jurisprudence. 2d. By the laws and practice of particular states and kingdoms. From the law of nations little or no illustration of this subject can be expected. By that law the several states and governments spread over our globe are considered as forming a society, not a

† "The question, in short, was, whether the Constitution was a bond of national unity, or such federal league only as would be dissoluble at the pleasure of any part to it. . . . Justice WILSON, the ablest and most learned of the associates, took the national view and was supported by two others. The Chief Justice was thus enabled to declare as the opinion of the court, that under the Constitution of the United States, sovereignty belonged to the people of the United States. . . . The doctrine of an indissoluble Union, though not in terms declared, is nevertheless in its elements at least contained in the decision. The qualified sovereignty, national and State, the subordination of State to nation, the position of the citizen as at once a necessary component part of the federal and of the State system, are all exhibited. It must logically follow that a nation as a sovereignty is possessed of all those powers of independent action and self-protection which the successors of Jay subsequently demonstrated were by implication conferred upon it." Cooley in Constitutional History as seen in American Law, 48, 49.

"It is not rational to suppose that a sovereign power shall be dragged before a court. The intent is to enable States to recover claims of individuals residing in other States." John Marshall in the Virginia Convention of 1787, Elliot's Debates, III, 555. A similar opinion is expressed by Hamilton in The Federalist, No. 81.

"The decision was pronounced on the 18th of February, 1793; two days afterward the Eleventh Amendment to the Constitution was proposed to Congress." Carson, The Supreme Court of the United States, 177.

nation. It has only been by a very few comprehensive minds, such as those of Elizabeth and the Fourth Henry, that this last great idea has been even contemplated. 3dly, and chiefly, I shall examine the important question before us, by the constitution of the United States, and the legitimate result of that valuable instrument. . . .

III. I am, thirdly and chiefly, to examine the important question now before us, by the constitution of the United States, and the legitimate result of that valuable instrument. Under this view the question is naturally subdivided into two others. 1. Could the constitution of the United States vest a jurisdiction over the State of Georgia? 2. Has that constitution vested such jurisdiction in this court? . . .

Concerning the prerogative of kings, and concerning the sovereignty of States, much has been said and written; but little has been said and written concerning a subject much more dignified and important, the majesty of the people. . . . The well-known address used by Demosthenes, when he harangued and animated his assembled countrymen, was, "O men of Athens." With the strictest propriety, therefore, classical and political, our national scene opens with the most magnificent object which the nation could present. "The people of the United States" are the first personages introduced. Who were those people? They were the citizens of thirteen States, each of which had a separate constitution and government, and all of which were connected together by articles of confederation. To the purposes of public strength and felicity that confederacy was totally inadequate. A requisition on the several States terminated its legislative authority; executive or judicial authority it had none. In order, therefore, to form a more perfect union, to establish justice, to insure domestic tranquillity, to provide for the common defense, and to secure the blessings of liberty, those people, among whom were the people of Georgia, ordained and established the present constitution. By that constitution legislative power is vested, executive power is vested, judicial power is vested.

The question now fairly opens to our view, could the people of those States, among whom were those of Georgia, bind those States, and Georgia among the others, by the legislative, executive, and judicial power so vested? If the principles on which I

have founded myself are just and true, this question must, unavoidably, receive an affirmative answer. If those States were the work of those people, those people, and that I may apply the case closely, the people of Georgia, in particular, could alter, as they pleased, their former work; to any given degree, they could diminish as well as enlarge it. Any or all of the former State powers they could extinguish or transfer. The inference which necessarily results is, that the constitution ordained and established by those people, and still closely to apply the case, in particular by the people of Georgia, could vest jurisdiction or judicial power over those States and over the State of Georgia in particular.

The next question under this head, is, Has the constitution done so? Did those people mean to exercise this their undoubted power? These questions may be resolved, either by fair and conclusive deductions, or by direct and explicit declarations. In order, ultimately to discover whether the people of the United States intended to bind those States by the judicial power vested by the national constitution, a previous inquiry will naturally be, did those people intend to bind those States by the legislative power vested by that constitution? The articles of confederation, it is well known, did not operate upon individual citizens; but operated only upon States. This defect was remedied by the national constitution, which, as all allow, has an operation on individual citizens. But if an opinion, which some seem to entertain, be just, the defect remedied on one side was balanced by a defect introduced on the other; for they seem to think that the present constitution operates only on individual citizens, and not on States. This opinion, however, appears to be altogether unfounded. When certain laws of the States are declared to be "subject to the revision and control of the Congress,"* it cannot, surely, be contended that the legislative power of the national government was meant to have no operation on the several States. The fact uncontrovertibly established in one instance, proves the principle in all other instances to which the facts will be found to apply. We may then infer that the people of the United States intended to bind the several States by the legislative power of the national government.

In order to make the discovery, at which we ultimately aim, a second previous inquiry will naturally be, Did the people of the

* Art. 1, sec. 10.

United States intend to bind the several States by the executive power of the national government? The affirmative answer to the former question directs, unavoidably, an affirmative answer to this. . . . The same principle, therefore, which directed us from the first to the second step, will direct us to the third and last step of our deduction. Fair and conclusive deduction, then, evinces that the people of the United States did vest this court with jurisdiction over the State of Georgia. The same truth may be deduced from the declared objects and the general texture of the constitution of the United States. One of its declared objects is, to form a union more perfect than, before that time, had been formed. Before that time the Union possessed legislative, but unenforced legislative power over the States. Nothing could be more natural than to intend that this legislative power should be enforced by powers executive and judicial. Another declared object is "to establish justice." This points, in a particular manner, to the judicial authority. And when we view this object in conjunction with the declaration, "that no State shall pass a law impairing the obligation of contracts," we shall probably think that this object points, in a particular manner, to the jurisdiction of the court over the several States. What good purpose could this constitutional provision secure if a State might pass a law impairing the obligation of its own contracts, and be amenable, for such a violation of right, to no controlling judiciary power? We have seen, that on principles of general jurisprudence, a State, for the breach of a contract, may be liable for damages. A third declared object is, "to insure domestic tranquillity." This tranquillity is most likely to be disturbed by controversies between States. These consequences will be most peaceably and effectually decided by the establishment and by the exercise of a superintending judicial authority. By such exercise and establishment, the law of nations—the rule between contending States—will be enforced among the several States in the same manner as municipal law.

Whoever considers, in a combined and comprehensive view, the general texture of the constitution, will be satisfied that the people of the United States intended to form themselves into a nation for national purposes. They instituted, for such purposes, a national government complete in all its parts, with powers legislative, executive and judiciary; and in all those powers

extending over the whole nation. Is it congruous that, with regard to such purposes, any man or body of men, any person, natural or artificial, should be permitted to claim successfully an entire exemption from the jurisdiction of the national government? Would not such claims, crowned with success, be repugnant to our very existence as a nation? When so many trains of deduction, coming from different quarters, converge and unite at last in the same point, we may safely conclude, as the legitimate result of this constitution, that the State of Georgia is amenable to the jurisdiction of this court.

But, in my opinion, this doctrine rests not upon the legitimate result of fair and conclusive deduction from the constitution; it is confirmed, beyond all doubt, by the direct and explicit declaration of the constitution itself. "The judicial power of the United States shall extend to controversies between two States."* Two States are supposed to have a controversy between them; this controversy is supposed to be brought before those vested with the judicial power of the United States; can the most consummate degree of professional ingenuity devise a mode by which this "controversy between two States" can be brought before a court of law, and yet neither of those States be a defendant? "The judicial power of the United States shall extend to controversies between a State and citizens of another State." Could the strictest legal language; could even that language which is peculiarly appropriated to an act, deemed by a great master to be one of the most honorable, laudable, and profitable things in our law; could this strict and appropriated language describe with more precise accuracy the cause now depending before the tribunal? Causes, and not parties to causes, are weighed by justice in her equal scales; on the former, solely, her attention is fixed; to the latter she is, as she is painted, blind.

I have now tried this question by all the touchstones to which I proposed to apply it. I have examined it by the principles of general jurisprudence; by the laws and practice of States and kingdoms; and by the constitution of the United States. From all, the combined inference is, that the action lies.

CUSHING, J. The grand and principal question, in this case, is whether a State can, by the federal constitution, be sued by

* Art. 3, s. 2.

an individual citizen of another State. The point turns not upon the law or practice of England, although perhaps it may be in some measure elucidated thereby, nor upon the law of any other country whatever; but upon the constitution established by the people of the United States; and particularly upon the extent of powers given to the federal judiciary in the 2d section of the 3d article of the constitution. It is declared that "the judicial power shall extend to all cases in law and equity arising under the constitution, the laws of the United States, or treaties made or which shall be made under their authority: to all cases affecting ambassadors or other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, and citizens of another State; between citizens of different States; between citizens of the same States claiming lands under grants of different States; and between a State and citizens thereof and foreign States, citizens or subjects." The judicial power, then, is expressly extended to "controversies between a State and citizens of another State." When a citizen makes a demand against a State of which he is not a citizen, it is as really a controversy between a State and a citizen of another State, as if such State made a demand against such citizen. The case then seems clearly to fall within the letter of the constitution. It may be suggested that it could not be intended to subject a State to be a defendant, because it would affect the sovereignty of States. If that be the case, what shall we do with the immediate preceding clause: "controversies between two or more States," where a State must of necessity be a defendant? If it was not the intent, in the very next clause also, that a State might be made defendant, why was it so expressed as naturally to lead to and comprehend that idea? Why was not an exception made if one was intended? . . .

But still it may be insisted that this will reduce States to mere corporations, and take away all sovereignty. As to corporations, all States whatever are corporations or bodies politic. The only question is, what are their powers? As to individual States and the United States, the constitution marks the boundary of powers. Whatever power is deposited with the Union by the people for their own necessary security, is so far a curtailment of the power and prerogatives of the States. This is, as it were, a self-

evident proposition; at least it cannot be contested. Thus the power of declaring war, making peace, raising and supporting armies for public defense, levying duties, excises, and taxes, if necessary, with many other powers, are lodged in Congress, and are a most essential abridgement of State sovereignty. Again, the restrictions upon the States. "No State shall enter into any treaty, alliance, or confederation, coin money, emit bills of credit, make anything but gold and silver a tender in payment of debts, pass any law impairing the obligation of contracts; these, with a number of others, are important restrictions of the power of States, and were thought necessary to maintain the Union, and to establish some fundamental uniform principles of public justice throughout the whole Union. So that I think no argument of force can be taken from the sovereignty of States. Where it has been abridged, it was thought necessary for the greater indispensable good of the whole. If the constitution is found inconvenient in practice in this or any other particular, it is well that a regular mode is pointed out for amendment. But while it remains, all offices, legislative, executive, and judicial, both of the States and of the Union, are bound by oath to support it. . . . Upon the whole, I am of opinion that the constitution warrants a suit against a State by an individual citizen of another State. . . .

JAY, C. J. . . . Let us now proceed to inquire whether Georgia has not, by being a party to the national compact, consented to be suable by individual citizens of another State. This inquiry naturally leads to our attention, 1st. To the design of the constitution. 2d. To the letter and express declaration in it.

Prior to the date of the constitution, the people had not any national tribunal to which they could resort for justice; the distribution of justice was then confined to State judicatories, in whose institution and organization the people of the other States had no participation, and over whom they had not the least control. There was then no general court of appellate jurisdiction by whom the errors of State courts, affecting either the nation at large or the citizens of any other State, could be revised and corrected. Each State was obliged to acquiesce in the measure of justice which another State might yield to her or to her citizens; and that even in cases where State considerations

were not always favorable to the most exact measure. There was danger that from this source animosities would in time result; and as the transition from animosities to hostilities was frequent in the history of independent States, a common tribunal for the termination of controversies became desirable, from motives both of justice and of policy.

Prior also to that period the United States had, by taking a place among the nations of the earth, become amenable to the laws of nations, and it was their interest as well as their duty to provide that those laws should be respected and obeyed; in their national character and capacity the United States were responsible to foreign nations for the conduct of each State, relative to the laws of nations, and the performance of treaties; and there the inexpediency of referring all such questions to State courts, and particularly to the courts of delinquent States, became apparent. While all the States were bound to protect each and the citizens of each, it was highly proper and reasonable that they should be in a capacity not only to cause justice to be done to each, and the citizens of each, but also to cause justice to be done by each, and the citizens of each, and that, not by violence and force, but in a stable, sedate, and regular course of judicial procedure.

These were among the evils against which it was proper for the nation, that is, the people of all the United States, to provide by a national judiciary, to be instituted by the whole nation, and to be responsible to the whole nation.

Let us now turn to the constitution. The people therein declare that their design in establishing it comprehended six objects. 1st. To form a more perfect union. 2d. To establish justice. 3d. To insure domestic tranquillity. 4th. To provide for the common defense. 5th. To promote the general welfare. 6th. To secure the blessings of liberty to themselves and their posterity. . . .

It may be asked, what is the precise sense and latitude in which the words "to establish justice," as here used, are to be understood? The answer to this question will result from the provisions made in the constitution on this head. They are specified in the second section of the third article, where it is ordained that the judicial power of the United States shall extend to ten descriptions of cases, namely: 1st. To all cases

arising under this constitution; because the meaning, construction, and operation of a compact ought always to be ascertained by all the parties, or by authority derived only from one of them. 2d. To all cases arising under the laws of the United States; because as such laws, constitutionally made, are obligatory on each State, the measure of obligation and obedience ought not to be decided and fixed by the party from whom they are due, but by a tribunal deriving authority from both the parties. 3d. To all cases arising under treaties made by their authority; because, as treaties are compacts made by, and obligatory on the whole nation, their operation ought not to be affected or regulated by the local laws or courts of a part of the nation. 4th. To all cases affecting ambassadors, or other public ministers and consuls; because, as these are officers of foreign nations, whom this nation are bound to protect and treat according to the laws of nations, cases affecting them ought only to be cognizable by national authority. 5th. To all cases of admiralty and maritime jurisdiction; because, as the seas are the joint property of nations, whose right and privileges relative thereto are regulated by the laws of nations and treaties, such cases necessarily belong to national jurisdiction. 6th. To controversies to which the United States shall be a party; because, in cases in which the whole people are interested it would not be equal or wise to let any one state decide and measure out the justice due to others. 7th. To controversies between two or more States; because domestic tranquillity requires that the contentions of States should be peaceably terminated by a common judicatory; and, because, in a free country, justice ought not to depend on the will of either of the litigants. 8th. To controversies between a State and citizens of another State; because, in case a State (that is, all the the citizens of it) has demands against some citizens of another State, it is better that she should prosecute their demands in a national court, than in a court of the State to which those citizens belong; the danger of irritation and criminations arising from apprehensions and suspicions of partiality being thereby obviated; because, in cases where some citizens of one State have demands against all the citizens of another State, the cause of liberty and the rights of men forbid that the latter should be the sole judges of the justice due to the latter; and true republican government requires that free and equal citizens should have free, fair, and equal justice. 9th. To

controversies between citizens of the same State, claiming lands under grants of different States; because, as the rights of the two States to grant the land are drawn into question, neither of the two States ought to decide the question. 10th. To controversies between a State or the citizens thereof and foreign States, citizens or subjects; because, as every nation is responsible for the conduct of its citizens towards other nations, all questions touching the justice due to foreign nations, or people, ought to be ascertained by, and depend on, national authority. Even this cursory view of the judicial powers of the United States leaves the mind strongly impressed with the importance of them to the preservation of the tranquillity, the equal sovereignty, and the equal right of the people.

The question now before us renders it necessary to pay particular attention to that part of the second section which extends the judicial power "to controversies between a State and citizens of another State." It is contended that this ought to be construed to reach none of these controversies, excepting those in which a State may be plaintiff. The ordinary rules for construction will easily decide whether those words are to be understood in that limited sense.

This extension of power is remedied, because it is to settle controversies. It is, therefore, to be construed liberally. It is politic, wise, and good, that not only the controversies in which a State is plaintiff, but also those in which a State is defendant, should be settled; both cases, therefore, are within the reason of the remedy; and ought to be so adjudged, unless the obvious, plain, and literal sense of the words forbid it. . . .

For the reasons before given, I am clearly of opinion that a State is suable by citizens of another State; but lest I should be understood in a latitude beyond my meaning, I think it necessary to subjoin this caution, namely, That such suability may nevertheless not extend to all the demands, and to every kind of action; there may be exceptions. For instance, I am far from being prepared to say that an individual may sue a State on bills of credit issued before the constitution was established, and which were issued and received on the faith of the State, and at a time when no ideas or expectations of judicial interposition were entertained or contemplated.

[Justice IREDELL delivered a dissenting opinion. Justice BLAIR rendered a concurring opinion.]

CHAPTER III.

GRANT OF POWERS TO CONGRESS—IMPLIED POWERS.

IN CONSTRUING THE GRANT OF POWERS TO CONGRESS THAT METHOD SHALL BE FOLLOWED WHICH PERMITS THE FULFILLMENT OF THE PURPOSE OF THE GRANT. THE POWERS NECESSARY AND PROPER TO CARRY INTO EFFECT THE ENUMERATED POWERS GIVEN TO CONGRESS MAY BE EXERCISED, UNLESS PROHIBITED BY THE CONSTITUTION.*

LEGAL TENDER CASES.

KNOX v. LEE. PARKER v. DAVIS.

12 Wallace, 457. Decided 1871.

These were two suits; the first a writ of error to the Circuit Court for the Western District of Texas, the second an appeal from a decree in equity in the Supreme Judicial Court of Massachusetts. . . .

Mr. Justice STRONG delivered the opinion of the court.

The controlling questions in these cases are the following: Are the acts of Congress, known as the legal tender acts, constitutional when applied to contracts made before their passage; and, secondly, are they valid as applicable to debts contracted since their enactment? These questions have been elaborately argued, and they have received from the court that consideration which their great importance demands. It would be difficult to overestimate the consequences which must follow our decision. They will affect the entire business of the country, and take hold of the possible continued existence of the government. If it be held by this court that Congress has no constitutional power, under any circumstances, or in any emergency, to make

* See, Sec. 131 and 164, Vol. 2, *Cyclopedia of Law*. Also *Gibbons v. Ogden*, *post*, page 177.

treasury notes a legal tender for the payment of all debts (a power confessedly possessed by every independent sovereignty other than the United States), the government is without those means of self-preservation which, all must admit, may, in certain contingencies, become indispensable, even if they were not when the acts of Congress now called in question were enacted. It is also clear that if we hold the acts invalid as applicable to debts incurred, or transactions which have taken place since their enactment, our decision must cause, throughout the country, great business derangement, widespread distress, and the rankest injustice. The debts which have been contracted since February 25th, 1862, constitute, doubtless, by far the greatest portion of the existing indebtedness of the country. They have been contracted in view of the acts of Congress declaring treasury notes a legal tender, and in reliance upon that declaration. Men have bought and sold, borrowed and lent, and assumed every variety of obligations contemplating that payment might be made with such notes. Indeed, legal tender treasury notes have become the universal measures of value. If now, by our decision, it be established that these debts and obligations can be discharged only by gold coin; if, contrary to the expectation of all parties to these contracts, legal tender notes are rendered unavailable, the government has become an instrument of the grossest injustice; all debtors are loaded with an obligation it was never contemplated they should assume; a large percentage is added to every debt, and such must become the demand for gold to satisfy contracts, that ruinous sacrifices, general distress, and bankruptcy may be expected. These consequences are too obvious to admit of question. And there is no well-founded distinction to be made between the constitutional validity of an act of Congress declaring treasury notes a legal tender for the payment of debts contracted after its passage and that of an act making them a legal tender for the discharge of all debts, as well as those incurred before as those made after its enactment. There may be a difference in the effects produced by the acts, and in the hardship of their operation, but in both cases the fundamental question, that which tests the validity of the legislation, is, can Congress constitutionally give to treasury notes the character and qualities of money? Can such notes be constituted a legitimate circulating medium, having a defined legal value?

If they can, then such notes must be available to fulfill all contracts (not expressly excepted) solvable in money, without reference to the time when the contracts were made. Hence it is not strange that those who hold the legal tender acts unconstitutional when applied to contracts made before February, 1862, find themselves compelled also to hold that the acts are invalid as to debts created after that time, and to hold that both classes of debts alike can be discharged only by gold and silver coin.

The consequences of which we have spoken, serious as they are, must be accepted, if there is a clear incompatibility between the Constitution and the legal tender acts. But we are unwilling to precipitate them upon the country unless such an incompatibility plainly appears. A decent respect for a co-ordinate branch of the government demands that the judiciary should presume, until the contrary is clearly shown, that there has been no transgression of power by Congress—all the members of which act under the obligation of an oath of fidelity to the Constitution. Such has always been the rule. . . .

Nor can it be questioned that, when investigating the nature and extent of the powers conferred by the Constitution upon Congress, it is indispensable to keep in view the objects for which those powers were granted. This is a universal rule of construction applied alike to statutes, wills, contracts, and constitutions. If the general purpose of the instrument is ascertained, the language of its provisions must be construed with reference to that purpose, and so as to subserve it. In no other way can the intent of the framers of the instrument be discovered. And there are more urgent reasons for looking to the ultimate purpose in examining the powers conferred by a constitution than there are in construing a statute, a will, or a contract. We do not expect to find in a constitution minute details. It is necessarily brief and comprehensive. It prescribes outlines, leaving the filling up to be deduced from the outlines. . . .

If these are correct principles, if they are proper views of the manner in which the Constitution is to be understood, the powers conferred upon Congress must be regarded as related to each other, and all means for a common end. Each is but a part of a system, a constituent of one whole. No single power is the ultimate end for which the Constitution was adopted. It may, in a very proper sense, be treated as a means for the accomplish-

ment of a subordinate object, but that object is itself a means designed for an ulterior purpose. Thus the power to levy and collect taxes, to coin money and regulate its value, to raise and support armies, or to provide for and maintain a navy, are instruments for the paramount object, which was to establish a government, sovereign within its sphere, with capability of self-preservation, thereby forming a union more perfect than that which existed under the old Confederacy.

The same may be asserted also of all the non-enumerated powers included in the authority expressly given "to make all laws which shall be necessary and proper for carrying into execution the specified powers vested in Congress, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof." It is impossible to know what those non-enumerated powers are, and what is their nature and extent, without considering the purposes they were intended to subserve. Those purposes, it must be noted, reach beyond the mere execution of all powers definitely intrusted to Congress and mentioned in detail. They embrace the execution of all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. It certainly was intended to confer upon the government the power of self-preservation. . . . And, that important powers were understood by the people who adopted the Constitution to have been created by it, powers not enumerated, and not included incidentally in any one of those enumerated, is shown by the amendments. The first ten of these were suggested in the conventions of the States, and proposed at the first session of the first Congress, before any complaint was made of a disposition to assume doubtful powers. The preamble to the resolution submitting them for adoption recited that the "conventions of a number of the States had, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added." This was the origin of the amendments, and they are significant. They tend plainly to show that, in the judgment of those who adopted the Constitution, there were powers created by it, neither expressly specified nor reducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of

powers conferred upon the government, or out of the sovereignty instituted. Most of these amendments are denials of power which had not been expressly granted, and which cannot be said to have been necessary and proper for carrying into execution any other powers. Such, for example, is the prohibition of any laws respecting the establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press.

And it is of importance to observe that Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power. Powers thus exercised are what are called by Judge Story, in his Commentaries on the Constitution, resulting powers, arising from the aggregate powers of the government. He instances the right to sue and make contracts. Many others might be given. . . .

Indeed, the whole history of the government and of congressional legislation has exhibited the use of a very wide discretion, even in times of peace and in the absence of any trying emergency, in the selection of the necessary and proper means to carry into effect the great objects for which the government was framed, and this discretion has generally been unquestioned, or, if questioned, sanctioned by this court. This is true not only when an attempt has been made to execute a single power specifically given, but equally true when the means adopted have been appropriate to the execution, not of a single authority, but of all the powers created by the Constitution. Under the power to establish post-offices and post-roads Congress has provided for carrying the mails, punishing theft of letters and mail robberies, and even for transporting the mails to foreign countries. Under the power to regulate commerce, provision has been made by law for the improvement of harbors, the establishment of observatories, the erection of lighthouses, breakwaters, and buoys, the registry, enrollment, and construction of ships, and a code has been enacted for the government of seamen. Under the same power and other powers over the revenue and the currency of the country, for the convenience of the treasury and internal commerce, a corporation known as the United States Bank was early created. To its capital the government subscribed one-fifth of its stock. But the corporation was a private one, doing business for its own profit. Its incorporation

was a constitutional exercise of congressional power for no other reason than that it was deemed to be a convenient instrument or means for accomplishing one or more of the ends for which the government was established, or, in the language of the first article, already quoted, "necessary and proper" for carrying into execution some or all the powers vested in the government. Clearly this necessity, if any existed, was not a direct and obvious one. Yet this court, in *McCulloch v. Maryland*,* unanimously ruled that in authorizing the bank, Congress had not transcended its powers. So debts due to the United States have been declared by acts of Congress entitled to priority of payment over debts due to other creditors, and this court has held such acts warranted by the Constitution.†

With these rules of constitutional construction before us, settled at an early period in the history of the government, hitherto universally accepted, and not even now doubted, we have a safe guide to a right decision of the questions before us. Before we can hold the legal tender unconstitutional, we must be convinced they were not appropriate means, or means conducive to the execution of any or all of the powers of Congress, or of the government, not appropriate in any plain degree (for we are not judges of the degree of appropriateness), or we must hold that they were prohibited. This brings us to the inquiry whether they were, when enacted, appropriate instrumentalities for carrying into effect or executing any of the known powers of Congress or of any department of the government. Plainly to this inquiry a consideration of the time when they were enacted, and of the circumstances in which the government then stood, is important. It is not to be denied that acts may be adapted to the exercise of lawful power, and appropriate to it, in seasons of exigency, which would be inappropriate at other times.

We do not propose to dilate at length upon the circumstances in which the country was placed, when Congress attempted to make treasury notes a legal tender. They are of too recent occurrence to justify enlarged description. Suffice it to say that a civil war was then raging which seriously threatened the overthrow of the government and the destruction of the Constitution itself. It demanded the equipment and support of large

* 4 Wheaton, 416.

† *Fisher v. Blight*, 2 Cranch, 353.

armies and navies, and the employment of money to an extent beyond the capacity of all ordinary sources of supply. Meanwhile the public treasury was nearly empty, and the credit of the government, if not stretched to its utmost tension, had become nearly exhausted. Moneyed institutions had advanced largely of their means, and more could not be expected of them. They had been compelled to suspend specie payments. Taxation was inadequate to pay even the interest on the debt already incurred, and it was impossible to await the income of additional taxes. The necessity was immediate and pressing. The army was unpaid. There was then due to the soldiers in the field nearly a score of millions of dollars. The requisitions from the War and Navy Departments for supplies exceeded fifty millions, and the current expenditure was over one million per day. The entire amount of coin in the country, including that in private hands, as well as that in banking institutions, was insufficient to supply the need of the government three months, had it all been poured into the treasury. Foreign credit we had none. We say nothing of the overhanging paralysis of trade, and of business generally, which threatened loss of confidence in the ability of the government to maintain its continued existence, and therefore with the complete destruction of all remaining national credit.

It was at such a time and in such circumstances that Congress was called upon to devise means for maintaining the army and navy, for securing the large supplies of money needed, and, indeed, for the preservation of the government created by the Constitution. It was at such a time and in such an emergency that the legal tender acts were passed. Now, if it were certain that nothing else would have supplied the absolute necessities of the treasury, that nothing else would have enabled the government to maintain its armies and navy, that nothing else would have saved the government and the Constitution from destruction, while the legal tender acts would, could any one be bold enough to assert that Congress transgressed its powers? Or if these enactments did work these results, can it be maintained now that they were not for a legitimate end, or "appropriate and adapted to that end," in the language of Chief Justice Marshall? That they did work such results is not to be doubted. Something revived the drooping faith of the people; something brought immediately to the government's aid the resources of

the nation, and something enabled the successful prosecution of the war, and the preservation of the national life. What was it, if not the legal tender enactments? . . .

Is it our province to decide that the means selected were beyond the constitutional power of Congress, because we may think that other means to the same ends would have been more appropriate and equally efficient? That would be to assume legislative power, and to disregard the accepted rules for construing the Constitution. The degree of the necessity for any congressional enactment, or the relative degree of its appropriateness, if it have any appropriateness, is for consideration in Congress, not here. Said Chief Justice Marshall, in *McCulloch v. Maryland*, as already stated, "When the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."

It may be conceded that Congress is not authorized to enact laws in furtherance even of a legitimate end, merely because they are useful, or because they make the government stronger. There must be some relation between the means and the end; some adaptedness or appropriateness of the laws to carry into execution the powers created by the Constitution. But when a statute has proved effective in the execution of powers confessedly existing, it is not too much to say that it must have had some appropriateness to the execution of those powers. The rules of construction heretofore adopted, do not demand that the relationship between the means and the end shall be direct and immediate.

Concluding, then, that the provision which made treasury notes a legal tender for the payment of all debts other than those expressly excepted, was not an inappropriate means for carrying into execution the legitimate powers of the government, we proceed to inquire whether it was forbidden by the letter or spirit of the Constitution. It is not claimed that any express prohibition exists, but it is insisted that the spirit of the Constitution was violated by the enactment. Here those who assert the unconstitutionality of the acts mainly rest their argument. They claim that the clause which conferred upon Congress power "to coin money, regulate the value thereof, and of foreign coin,"

contains an implication that nothing but that which is the subject of coinage, nothing but the precious metals can ever be declared by law to be money, or to have the uses of money. If by this is meant that because certain powers over the currency are expressly given to Congress, all other powers relating to the same subject are impliedly forbidden, we need only remark that such is not the manner in which the Constitution has always been construed. On the contrary it has been ruled that power over a particular subject may be exercised as auxiliary to an express power, though there is another express power relating to the same subject, less comprehensive.* . . .

The Constitution was intended to frame a government as distinguished from a league or compact, a government supreme in some particulars over States and people. It was designed to provide the same currency, having a uniform legal value in all the States. It was for this reason the power to coin money and regulate its value was conferred upon the Federal government, while the same power as well as the power to emit bills of credit was withdrawn from the States. . . .

We do not, however, rest our assertion of the power of Congress to enact legal tender laws upon this grant. We assert only that the grant can, in no just sense, be regarded as containing an implied prohibition against their enactment, and that, if it raises any implications, they are of complete power over the currency, rather than restraining.

We come next to the argument much used, and, indeed, the main reliance of those who assert the unconstitutionality of the legal tender acts. It is that they are prohibited by the spirit of the Constitution because they indirectly impair the obligation of contracts. The argument, of course, relates only to those contracts which were made before February, 1862, when the first act was passed, and it has no bearing upon the question whether the acts are valid when applied to contracts made after their passage. The argument assumes two things,—first, that the acts do, in effect, impair the obligation of contracts, and second, that Congress is prohibited from taking any action which may indirectly have that effect. Neither of these assumptions can be accepted. It is true, that, under the acts, a debtor, who be-

* *United States v. Marigold*, 9 Howard, 560.

came such before they were passed, may discharge his debt with the notes authorized by them, and the creditor is compellable to receive such notes in discharge of his claim. But whether the obligation of the contract is thereby weakened can be determined only after considering what was the contract obligation. It was not a duty to pay gold or silver, or the kind of money recognized by law at the time when the contract was made, nor was it a duty to pay money of equal intrinsic value in the market. (We speak now of contracts to pay money generally, not contracts to pay some specifically defined species of money.) The expectation of the creditor and the anticipation of the debtor may have been that the contract would be discharged by the payment of coined metals, but neither the expectation of one party to the contract respecting its fruits, nor the anticipation of the other constitutes its obligation. There is a well-recognized distinction between the expectation of the parties to a contract and the duty imposed by it.* Were it not so the expectation of results would be always equivalent to a binding engagement that they should follow. But the obligation of a contract to pay money is to pay that which the law shall recognize as money when the payment is to be made. If there is anything settled by decision it is this, and we do not understand it to be controverted.† No one ever doubted that a debt of one thousand dollars, contracted before 1834, could be paid by one hundred eagles coined after that year, though they contained no more gold than ninety-four eagles such as were coined when the contract was made, and this, not because of the intrinsic value of the coin, but because of its legal value. The eagles coined after 1834 were not money until they were authorized by law, and had they been coined before, without a law fixing their legal value, they could no more have paid a debt than uncoined bullion, or cotton, or wheat. Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power. Nor is this singular. A covenant for quiet enjoyment is not broken, nor is

* *Apreden v. Austin*, 5 Adolphus & Ellis, N. S., 671; *Dunn v. Sayles*, Ib., 685; *Coffin v. Landis*, 10 Wright, 426.

† *Davies*, 28; *Barrington v. Potter*, Dyer, 81, b. fol. 67; *Faw v. Marsteller*, 2 Cranch, 29.

its obligation impaired by the government's taking the land granted in virtue of its right of eminent domain. The expectation of the covenantee may be disappointed. He may not enjoy all he anticipated, but the grant was made and the covenant undertaken in subordination to the paramount right of the government.* We have been asked whether Congress can declare that a contract to deliver a quantity of grain may be satisfied by the tender of a less quantity. Undoubtedly not. But this is a false analogy. There is a wide distinction between a tender of quantities, or of specific articles, and a tender of legal values. Contracts for the delivery of specific articles belong exclusively to the domain of State legislation, while contracts for the payment of money are subject to the authority of Congress, at least so far as relates to the means of payment. They are engagements to pay with lawful money of the United States, and Congress is empowered to regulate that money. It cannot, therefore, be maintained that the legal tender acts impaired the obligation of contracts.

Nor can it be truly asserted that Congress may not, by its action, indirectly impair the obligation of contracts, if by the expression be meant rendering contracts fruitless, or partially fruitless. Directly it may, confessedly, by passing a bankrupt act, embracing past as well as future transactions. This is obliterating contracts entirely. So it may relieve parties from their apparent obligations indirectly in a multitude of ways. It may declare war, or, even in peace, pass non-intercourse acts or direct an embargo. All such measures may, and must operate seriously upon existing contracts, and may not merely hinder, but relieve the parties to such contracts entirely from performance. . . .

But, without extending our remarks further, it will be seen that we hold the acts of Congress constitutional as applied to contracts made either before or after their passage. In so holding, we overrule so much of what was decided in *Hepburn v. Griswold*,† as ruled the acts unwarranted by the Constitution so far as they apply to contracts made before their enactment.

* *Dobbins v. Brown*, 2 Jones (Pennsylvania), 75; *Workman v. Mifflin*, 6 Casey, 362.

† 8 Wallace, 603.

That case was decided by a divided court, and by a court having a less number of judges than the law then in existence provided this court shall have. These cases have been heard before a full court, and they have received our most careful consideration. The questions involved are constitutional questions of the most vital importance to the government and to the public at large. We have been in the habit of treating cases involving a consideration of constitutional power differently from those which concern merely private right.* We are not accustomed to hear them in the absence of a full court, if it can be avoided. Even in cases involving only private rights, if convinced we had made a mistake, we would hear another argument and correct our error. And it is no unprecedented thing in courts of last resort, both in this country and in England, to overrule decisions previously made. We agree this should not be done inconsiderately, but in a case of such far-reaching consequences as the present, thoroughly convinced as we are that Congress has not transgressed its powers, we regard it as our duty so to decide and to affirm both these judgments.

The other questions raised in the case of *Knox v. Lee* were substantially decided in *Texas v. White*.†

Judgment in each case affirmed.‡

* *Briscoe v. Bank of Kentucky*, 8 Peters, 118.

† 7 Wallace, 700.

‡ Mr. Justice BRADLEY filed a concurring opinion. The Chief Justice (CHASE) and Justices CLIFFORD and FIELD each delivered dissenting opinions. Mr. Justice NELSON also dissented from the opinion of the majority of the court. This decision in the *Legal Tender Cases* by a divided court, overruled the decision of the same court given the year before in the case of *Hepburn v. Griswold*, 8 Wallace, 603. The *Legal Tender Cases* were affirmed and followed in the case of *Juillard v. Greenman*, 110 U. S. 421 (1884), *post*, page 169.

EXCLUSIVE AND CONCURRENT POWERS.*

WHEN CONGRESS HAS EXERCISED ANY OF THE POWERS GRANTED, OR NECESSARILY IMPLIED IN THE CONSTITUTION, IT IS BEYOND THE POWER OF THE STATES TO NULLIFY THE ACTION OF CONGRESS, AS BY TAXING A BANK INCORPORATED BY CONGRESS.†

McCULLOCH v. MARYLAND.

4 Wheaton, 316; 4 Curtis, 415. (1819.)

[This was a suit in the courts of Maryland, by that State against plaintiff in error, as cashier of the Baltimore branch of the Bank of the United States, to recover taxes claimed to be due under a statute of Maryland. Defendant questioned the validity of such statute, and from the judgment against him, brought the case to this court by writ of error].

MARSHALL, C. J., delivered the opinion of the court.

In the case now to be determined, the defendant, a sovereign State, denies the obligation of a law enacted by the legislature of the Union; and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that State. The Constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that Constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the supreme court of the United States has the Constitution of our country devolved this important duty.

* See, Sec. 132, Vol. 2, Cyclopædia of Law; also, *Juillard v. Greenman*, 110 U. S. 421; *Legal Tender Cases*, *ante*, and *Sturges v. Crowninshield*, *post*, page 269, for further discussion of this subject.

† It is also beyond the power of Congress to tax State agencies as the salary of a Judge of the State of Massachusetts. *The Collector v. Day*, 11 Wall. 11 (1870).

The first question made in the cause is, has Congress power to incorporate a bank?

It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

It will not be denied that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted, if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the Constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

The power now contested was exercised by the first Congress elected under the present Constitution. The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the Constitution gave no countenance.

These observations belong to the cause; but they are not made

under the impression that, were the question entirely new, the law would be found irreconcilable with the Constitution.

In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the Constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The convention which framed the Constitution was, indeed, elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each State, by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by congress, and by the State legislatures, the instrument was submitted to the people. They acted upon it, in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several States; and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be measures of the people themselves, or become the measures of the State governments.

From these conventions the Constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and their posterity." The assent of the States, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept

or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The Constitution when thus adopted, was of complete obligation, and bound the State sovereignties.

It has been said that the people had already surrendered all their powers to the State sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government, does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the States. The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the State sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.

The government of the Union, then, (whatever may be the influence of this fact on the case), is, emphatically and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

In discussing these questions, the conflicting powers of the general and State governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this: that the government

of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, "this Constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it.

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "any thing in the constitution or laws of any State to the contrary notwithstanding."

Among the enumerated powers we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that every thing granted shall be expressly and minutely described.

. . .

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may, with great reason, be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. . . .

It is not denied that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation.

On what foundation does this argument rest? On this alone: The power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on Congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever, is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of Congress to pass other laws for the accomplishment of the same objects.

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception. . . .

But the Constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the government of the United States, or in any department thereof."

The counsel for the State of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.

In support of this proposition, they have found it necessary

to contend that this clause was inserted for the purpose of conferring on Congress the power of making laws. That, without it, doubts might be entertained, whether Congress could exercise its powers in the form of legislation.

But could this be the object for which it was inserted? A government is created by the people, having legislative, executive, and judicial powers. Its legislative powers are vested in a Congress, which is to consist of a Senate and House of Representatives. Each house may determine the rule of its proceedings; and it is declared that every bill which shall have passed both houses, shall, before it becomes a law, be presented to the President of the United States. The 7th section describes the course of proceedings, by which a bill shall become a law; and, then, the 8th section enumerates the powers of Congress. Could it be necessary to say that a legislature should exercise legislative powers, in the shape of legislation? After allowing each house to prescribe its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the convention, that an express power to make laws was necessary to enable the legislature to make them? That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.

But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently

imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means, calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word “necessary” is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases. This comment on the word is well illustrated, by the passage cited at the bar, from the 10th section of the 1st article of the Constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying “imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws,” with that which authorizes Congress “to make all laws which shall be necessary and proper for carrying into execution” the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word “necessary,” by prefixing the word “absolutely.” This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as

not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a Constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. . . .

In ascertaining the sense in which the word "necessary" is used in this clause of the Constitution, we may derive some aid from that with which it is associated. Congress shall have power "to make all laws which shall be necessary and proper to carry into execution" the powers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the State of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not straitened and compressed within the narrow limits for which gentlemen contend.

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the State of Maryland, is founded on the intention of the convention, as manifested in the whole clause. To waste time and argument in proving that, without it, Congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun. As little can it be required to prove, that in the absence of this clause, Congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional. This clause, as construed by the State of Maryland, would abridge and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy. We think so for the following reasons:

1. The clause is placed among the powers of Congress, not among the limitations on those powers.
2. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power,

not a restriction on those already granted. No reason has been or can be assigned, for thus concealing an intention to narrow the discretion of the national legislature, under words which purport to enlarge it. The framers of the Constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and after deep reflection, impress on the mind another, they would rather have disguised the grant of power than its limitation. If, then, their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these: "In carrying into execution the foregoing powers, and all others," etc., "no laws shall be passed but such as are necessary and proper." Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

If a corporation may be employed indiscriminately with other

means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. . . .

But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. . . .

After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land.

The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional. It would have been unwise to locate them in the charter, and it would be unnecessarily inconvenient to employ the legislative power in making those subordinate arrangements. The great duties of the bank are prescribed; those duties require branches, and the bank itself may, we think, be safely trusted with the selection of places where those branches shall be fixed; reserving always to the government the right to require that a branch shall be located where it may be deemed necessary.

It being the opinion of the court that the act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire:

2. Whether the State of Maryland may, without violating the constitution, tax that branch? That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The States are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If

the obligation of this prohibition must be conceded—if it may restrain a State from the exercise of its taxing power on imports and exports; the same paramount character would seem to restrain, as it certainly may restrain, a State from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.

On this ground the counsel for the bank place its claim to be exempted from the power of a State to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.

This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1. That a power to create implies a power to preserve. 2. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and preserve. 3. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

These propositions, as abstract truths, would, perhaps, never be controverted. Their application to this case, however, has been denied; and, both in maintaining the affirmative and the negative, a splendor of eloquence, and strength of argument, seldom, if ever surpassed, have been displayed.

The power of congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable.

That the power of taxing it by the States may be exercised so as to destroy it, is too obvious to be denied. . . .

The argument on the part of the State of Maryland, is, not that the States may directly resist a law of congress, but that they may exercise their acknowledged powers upon it, and that

the constitution leaves them this right in the confidence that they will not abuse it. . . .

The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them. . . .

We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise.

But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised by the respective States, consistently with fair construction of the constitution?

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word confidence. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the

people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is. . . .

If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States. . . .

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.

JUDGMENT. This cause came on to be heard on the transcript of the record of the court of appeals of the State of Maryland, and was argued by counsel. On consideration whereof, it is the opinion of this court that the act of the legislature of Maryland is contrary to the constitution of the United States, and void. . . . The judgment of the Supreme Court of Maryland is therefore *Reversed.*

CHAPTER IV.

THE TAXING POWER—LIMITATIONS.*

LIMITATIONS AS TO THE PURPOSE OF THE TAX. ANY TAX LEVIED FOR A PROFESSEDLY PRIVATE PURPOSE IS VOID AS BEING UNCONSTITUTIONAL.

LOAN ASSOCIATION v. TOPEKA.

Reported in 20 Wallace, 655. (1874.)

ERROR to the Circuit Court for the District of Kansas.

The Citizens' Savings and Loan Association of Cleveland brought their action in the court below, against the city of Topeka, on coupons for interest attached to bonds of the city of Topeka.

The bonds on their face purported to be payable to the King Wrought-Iron Bridge Manufacturing and Iron-Works Company, of Topeka, to aid and encourage that company in establishing and operating bridge shops in said city of Topeka, under and in pursuance of section twenty-six of an act of the legislature of the State of Kansas, entitled "An act to incorporate cities of the second class," approved February 29, 1872; and also of another "Act to authorize cities and counties to issue bonds for the purpose of building bridges, aiding railroads, water-power, or other works of internal improvement," approved March 2, 1872.

The city issued one hundred of these bonds for \$1,000 each, as a donation (and so it was stated in the declaration), to encourage that company in its design of establishing a manufactory of iron bridges in that city.

The declaration also alleged that the interest coupons first due were paid out of a fund raised by taxation for that purpose, and that after this payment the plaintiff became the purchaser of the bonds and the coupons on which suit was brought for value.

A demurrer was interposed by the city of Topeka to this declaration.

*See, Secs. 133 to 135, Vol. 2, Cyclopedia of Law series.

The section of the act of February 29, on which the main reliance was placed for the authority to issue these bonds, reads as follows:

“SECTION 76. The council shall have power to encourage the establishment of manufactories and such other enterprises as may tend to develop and improve such city, either by direct appropriation from the general fund or by the issuance of bonds of such city in such amounts as the council may determine; Provided, That no greater amount than one thousand dollars shall be granted for any one purpose, unless a majority of the votes cast at an election called for that purpose shall authorize the same. The bonds thus issued shall be made payable at any time within twenty years, and bear interest not exceeding ten per cent. per annum.”

It was conceded that the steps required by this act prerequisite as to issuing the bonds were regular, as were also the other details, and that the language of the statute was sufficient to justify the action of the city authorities, if the statute was within the constitutional competency of the legislature.

The single question, therefore, for consideration raised by the demurrer was the authority of the legislature of the State of Kansas to enact this part of the statute.

The court below denied the authority, placing the denial on two grounds:

1st. That this part of the statute violated the fifth section of Article XII of the Constitution of the State of Kansas; a section in these words:

“SECTION 5. Provision shall be made by general law for the organization of cities, towns, and villages; and their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, shall be so restricted as to prevent the abuse of such power.”

[It was argued that the section of the act of February 29, 1872, conferring the power to issue bonds, contained no restriction as to the amount which the city might issue to aid manufacturing enterprises, and that the failure of the legislature to limit and restrict the power so as to prevent abuse, violated the fifth section of Article XII of the Constitution above referred to.]

2. That the act authorized the towns and other municipalities to which it applied, by issuing bonds or lending its credit, to

take the property of the citizen under the guise of taxation to pay these bonds, and use it in aid of the enterprises of others which were not of a public character; that this was a perversion of the right of taxation, which could only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain.

The court below accordingly, sustaining the demurrer, gave judgment in favor of the defendant, the city of Topeka, and to its judgment this writ of error was taken. . . .

Mr. Justice MILLER delivered the opinion of the court.

Two grounds are taken in the opinion of the circuit judge and in the argument of counsel for defendant, on which it is insisted that the section of the statute of February 29, 1872, on which the main reliance is placed to issue the bonds, is unconstitutional.

The first of these is, that by section five of article twelve of the Constitution of that State it is declared that provision shall be made by general law for the organization of cities, towns, and villages; and their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, shall be so restricted as to prevent the abuse of such power.

The argument is that the statute in question is void because it authorizes cities and towns to contract debts, and does not contain any restriction on the power so conferred. But whether the statute which confers power to contract debts should always contain some limitation or restriction, or whether a general restriction applicable to all cases should be passed, and whether in the absence of both the grant of power to contract is wholly void, are questions whose solution we prefer to remit to the State courts, as in this case we find ample reason to sustain the demurrer on the second ground on which it is argued by counsel and sustained by the Circuit Court.

That proposition is that the act authorizes the towns and other municipalities to which it applies, by issuing bonds or loaning their credit, to take the property of the citizen under the guise of taxation to pay these bonds, and use it in aid of the enterprises of others which are not of a public character, thus perverting the right of taxation, which can only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain.

The proposition as thus broadly stated is not new, nor is the question which it raises difficult of solution.

If these municipal corporations, which are in fact subdivisions of the State, and which for many reasons are vested with quasi-legislative powers, have a fund or other property out of which they can pay the debts which they contract, without resort to taxation, it may be within the power of the legislature of the State to authorize them to use it in aid of projects strictly private or personal, but which would in a secondary manner contribute to the public good; or where there is property or money vested in a corporation of the kind for a particular use, as public worship or charity, the legislature may pass laws authorizing them to make contracts in reference to this property, and incur debts payable from that source.

But such instances are few and exceptional, and the proposition is a very broad one, that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, and that all contracts creating debts to be paid in future, not limited to payment from some other source, imply an obligation to pay by taxation. It follows that in this class of cases the right to contract must be limited by the right to tax, and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it.

If this were not so, these corporations could make valid promises, which they have no means of fulfilling, and on which even the legislature that created them can confer no such power. The validity of a contract which can only be fulfilled by a resort to taxation depends on the power to levy the tax for that purpose.*

It is, therefore, to be inferred that when the legislature of the State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference.

With these remarks and with the reference to the authorities

* *Sharpless v. Mayor of Philadelphia*, 21 Pennsylvania State, 147, 167; *Hanson v. Vernon*, 27 Iowa, 28; *Allen v. Inhabitants of Jay*, 60 Maine, 127; *Lowell v. Boston*, Massachusetts (MS.); *Whiting v. Fond du Lac*, 25 Wisconsin, 188.

which support them, we assume that unless the legislature of Kansas had the right to authorize the counties and towns in that State to levy taxes to be used in aid of manufacturing enterprises, conducted by individuals, or private corporations, for purposes of gain, the law is void, and the bonds issued under it are also void. We proceed to the inquiry whether such a power exists in the legislature of the State of Kansas.

We have already said the question is not new. The subject of the aid voted to railways by counties and towns has been brought to the attention of the courts of almost every State in the Union. It has been thoroughly discussed and is still the subject of discussion in those courts. It is quite true that a decided preponderance of authority is to be found in favor of the proposition that the legislatures of the States, unless restricted by some special provisions of their constitutions, may confer upon these municipal bodies the right to take stock in corporations created to build railroads, and to lend their credit to such corporations. Also to levy the necessary taxes on the inhabitants, and on property within their limits subject to general taxation, to enable them to pay the debts thus incurred. But very few of these courts have decided this without a division among the judges of which they were composed, while others have decided against the existence of the power altogether.*

In all these cases, however, the decision has turned upon the question whether the taxation by which this aid was afforded to the building of railroads was for a public purpose. Those who came to the conclusion that it was, held the laws for that purpose valid. Those who could not reach that conclusion held them void. In all the controversy this has been the turning point of the judgments of the courts. And it is safe to say that no court has held debts created in aid of railroad companies, by counties or towns, valid on any other ground than that the purpose for which the taxes were levied was a public use, a purpose or object which it was the right and the duty of State governments to assist by money raised from the people by taxation. . . .

We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the

* The State v. Wapello Co., 9 Iowa, 308; Hanson v. Vernon, 27 Id., 28; Sharpless v. Mayor, etc., 21 Pennsylvania State, 147; Whiting v. Fond du Lac, 25 Wisconsin, 188.

validity of these laws never placed it on the ground of the unlimited power in the State legislature to tax the people, but conceded that where the purpose for which the tax was to be issued, could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power, and was an unauthorized invasion of private right.*

It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many. The theory of our governments, State and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B.†

* *Olcott v. Supervisors*, 16 Wallace, 639; *People v. Salem*, 20 Michigan, 452; *Jenkins v. Andover*, 103 Massachusetts, 94; *Dillon on Municipal Corporations*, § 587; 2 *Redfield's Laws of Railways*, 398, rule 2.

† *Whiting v. Fond du Lac*, 25 Wisconsin, 188; *Cooley on Constitutional Limitations*, 129, 175, 487; *Dillon on Municipal Corporations*, § 587.

Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of war, the national defense, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government.

The power to tax is therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall, in the case of *McCulloch v. The State of Maryland*,* that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent., imposed by the United States on the circulation of all other banks than the National banks, drove out of existence every State bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

Nor is it taxation. A "tax," says Webster's Dictionary, "is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or State." "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes."**

Coulter, J., in *Northern Liberties v. St. John's Church*,† says,

* 4 Wheaton, 431.

** Cooley on Constitutional Limitations, 479.

† 13 Pennsylvania State, 104; see also *Pray v. Northern Liberties*, 31 Id., 69; *Matter of Mayor of New York*, 11 Johnson, 77; *Camden v.*

very forcibly: "I think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations—that they are imposed for a public purpose."

We have established, we think, beyond cavil that there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not. . . .

Judgment affirmed.

[Mr. Justice CLIFFORD delivered a dissenting opinion.]

BUT THE LIMITATIONS UPON THE TAXING POWER DOES NOT PREVENT CONGRESS IN THE EXERCISE OF ITS LEGITIMATE POWERS FROM TAXING STATE BANKS OUT OF EXISTENCE.*

VEAZIE BANK v. FENNO.

8 Wallace, 533. Decided 1869.

On certificate of division for the Circuit Court for Maine.

The Constitution ordains that:

"The Congress shall have power—

"To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

"To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

"To coin money, regulate the value thereof, and of foreign coin."

It also ordains that:

"Direct taxes shall be apportioned among the several States . . . according to their respective numbers."

Allen, 2 Dutcher, 398; Sharpless v. Mayor of Philadelphia, *supra*; Hanson v. Vernon, 27 Iowa, 47; Whiting v. Fond du Lac, 25 Wisconsin, 188.

* See also McCulloch v. Maryland, *ante*, page 75.

"No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be made."

"The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."

With these provisions in force as fundamental law, Congress passed, July 13th, 1866,* an act, the second clause of the 9th section of which enacts:

"That every National banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of notes of any person, State bank, or State banking association, used for circulation and paid out by them after the 1st day of August, 1866, and such tax shall be assessed and paid in such manner as shall be prescribed by the commissioner of internal revenue."

Under this act a tax of ten per cent. was assessed upon the Vezie Bank, for its bank notes issued for circulation, after the day named in the act.

The Vezie Bank was a corporation chartered by the State of Maine, with authority to issue bank notes for circulation, and the notes on which the tax imposed by the act was collected, were issued under this authority. There was nothing in the case showing that the bank sustained any relation to the State as a financial agent, or that its authority to issue notes was conferred or exercised with any special reference to other than private interests.

The bank declined to pay the tax, alleging it to be unconstitutional, and the collector of internal revenue, one Fenno, was proceeding to make a distraint in order to collect it, with penalty and costs, when, in order to prevent this, the bank paid it under protest. An unsuccessful claim having been made on the commissioner of internal revenue for reimbursement, suit was brought by the bank against the collector, in the court below.

The case was presented to that court upon an agreed statement of facts, and, upon a prayer for instructions to the jury, the judges found themselves opposed in opinion on three ques-

* 14 Stat. at Large, 146.

tions, the first of which—the two others differing from it in form only, and not needing to be recited—was this:

“Whether the second clause of the 9th section of the act of Congress of the 13th of July, 1866, under which the tax in this case was levied and collected, is a valid and constitutional law.”

The Chief Justice delivered the opinion of the court.

The necessity of adequate provision for the financial exigencies created by the late rebellion, suggested to the administrative and legislative departments of the government important changes in the systems of currency and taxation which had hitherto prevailed. These changes, more or less distinctly shown in administrative recommendations, took form and substance in legislative acts. We have now to consider, within a limited range, those which relate to circulating notes and the taxation of circulation.

At the beginning of the rebellion the circulating medium consisted almost entirely of bank notes issued by numerous independent corporations variously organized under State legislation, of various degrees of credit, and very unequal resources, administered often with great, and not unfrequently, with little skill, prudence, and integrity. The acts of Congress, then in force, prohibiting the receipt or disbursement, in the transactions of the National government, of anything except gold and silver, and the laws of the States requiring the redemption of bank notes in coin on demand, prevented the disappearance of gold and silver from circulation. There was, then, no national currency except coin; there was no general* regulation of any other by National legislation; and no national taxation was imposed in any form on the State bank circulation.

The first act authorizing the emission of notes by the Treasury Department for circulation was that of July 17th, 1861.** The notes issued under this act were treasury notes, payable on demand in coin. The amount authorized by it was \$50,000,000, and was increased by the act of February 12th, 1862,† to \$60,000,000.

On the 31st of December, 1861, the State banks suspended

* See the act of December 27th, 1854, to suppress small notes in the District of Columbia, 10 Stat. at Large, 599.

** 12 Stat. at Large, 259.

† *Ib.*, 338.

specie payment. Until this time the expenses of the war had been paid in coin, or in the demand notes just referred to; and for some time afterwards, they continued to be paid in these notes, which, if not redeemed in coin, were received as coin in the payment of duties.

Subsequently, on the 25th day of February, 1862,† a new policy became necessary in consequence of the suspension and of the condition of the country, and was adopted. The notes hitherto issued, as has just been stated, were called treasury notes, and were payable on demand in coin. The act now passed authorized the issue of bills for circulation under the name of United States notes, made payable to bearer, but not expressed to be payable on demand, to the amount of \$150,000,000; and this amount was increased by subsequent acts to \$450,000,000, of which \$50,000,000 were to be held in reserve, and only to be issued for a special purpose, and under special directions as to the withdrawal from circulation.* These notes, until after the close of the war, were always convertible into, or receivable at par for bonds payable in coin, and bearing coin interest, at a rate not less than five per cent, and the acts by which they were authorized, declared them to be lawful money and a legal tender.

This currency, issued directly by the government for the disbursement of the war and other expenditures, could not, obviously, be a proper object of taxation.

But on the 25th of February, 1863, the act authorizing National banking associations† was passed, in which, for the first time during many years, Congress recognized the expediency and duty of imposing a tax upon currency. By this act a tax of two per cent annually was imposed on the circulation of the associations authorized by it. Soon after, by act of March 3d, 1863,** a similar but lighter tax of one per cent annually was imposed on the circulation of State banks in certain proportions to their capital, and of two per cent. on the excess; and the tax on the National associations was reduced to the same rates.

Both acts also imposed taxes on capital and deposits, which need not be noticed here.

‡ *Ib.*, 345.

* Act of July 11th, 1862, *Ib.*, 532; Act of March 3d, 1863, *Ib.*, 710.

† Act of March 3d, 1863, 12 *Ib.*, 670.

** *Ib.*, 712.

At a later date, by the act of June 3d, 1864,* which was substituted for the act of February 25th, 1863, authorizing National banking associations, the rate of tax on circulation was continued and applied to the whole amount of it, and the shares of their stockholders were also subjected to taxation by the States; and a few days afterwards, by the act of June 30th, 1864,† to provide ways and means for the support of the government, the tax on the circulation of the State banks was also continued at the same annual rate of one per cent., as before, but payment was required in monthly installments of one-twelfth of one per cent., with monthly reports from each State bank of the amount in circulation.

It can hardly be doubted that the object of this provision was to inform the proper authorities of the exact amount of paper money in circulation, with a view to its regulation by law.

The first step taken by Congress in that direction was by the act of July, 1862,‡ prohibiting the issue and circulation of notes under one dollar by any person or corporation. The act just referred to was the next, and it was followed some months later by the act of March 3d, 1865, amendatory of the prior internal revenue acts; the sixth section of which provides, "that every National banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of the notes of any State bank, or State banking association, paid out by them after the 1st day of July, 1866."***

The same provision was re-enacted, with a more extended application, on the 13th of July, 1866, in these words: "*Every National banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of notes of any person, State bank, or State banking association used for circulation, and paid out by them after the first day of August, 1866; and such tax shall be assessed and paid in such manner as shall be prescribed by the Commissioner of Internal Revenue.*"***

The constitutionality of this last provision is now drawn in

* 13 Ib., 111.

† Ib., 277.

‡ Act of March 3d, 1863, 12 Ib., 592.

** 13 Ib., 484.

*** 14 Ib., 146.

question, and this brief statement of the recent legislation of Congress has been made for the purpose of placing in a clear light its scope and bearing, especially as developed in the provisions just cited. It will be seen that when the policy of taxing bank circulation was first adopted in 1863, Congress was inclined to discriminate for, rather than against, the circulation of the State banks; but that when the country had been sufficiently furnished with a National currency by the issues of United States notes and of National bank notes, the discrimination was turned, and very decidedly turned, in the opposite direction.

The general question now before us is, whether or not the tax of ten per cent., imposed on State banks or National banks paying out the notes of individuals or State banks used for circulation, is repugnant to the Constitution of the United States.

In support of the position that the act of Congress, so far as it provides for the levy and collection of this tax, is repugnant to the Constitution, two propositions have been argued with much force and earnestness.

The first is that the tax in question is a direct tax, and has not been apportioned among the States agreeably to the Constitution.

The second is that the act imposing the tax impairs a franchise granted by the State, and that Congress has no power to pass any law with that intent or effect.

The first of these propositions will be first examined. . . .

Much diversity of opinion has always prevailed upon the question, what are direct taxes? Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. The enumeration of the different kinds of taxes which Congress was authorized to impose was probably made with little reference to their speculations. . . . We are obliged therefore to resort to historical evidence, and to seek the meaning of the words in the use and in the opinion of those whose relations to the government, and means of knowledge, warranted them in speaking with authority. And considered in this light, the meaning and application of the rule, as to direct taxes, appears to us quite clear. It is, as we think, distinctly shown in every act of Congress on the subject.

In each of these acts, a gross sum was laid upon the United States, and the total amount was apportioned to the several

States, according to their respective numbers of inhabitants, as ascertained by the last preceding census. Having been apportioned, provision was made for the imposition of the tax upon the subjects specified in the act, fixing its total sum. . . . In each instance, the total sum was apportioned among the States, by the constitutional rule, and was assessed at prescribed rates, on the subjects of the tax. These subjects, in 1798,* 1813,† 1815,‡ 1816,§ were lands, improvements, dwelling-houses, and slaves; and in 1861, lands, improvements, and dwelling-houses only. Under the act of 1798, slaves were assessed at fifty cents on each; under the other acts, according to valuation by assessors. This review shows that personal property, contracts, occupations, and the like, have never been regarded by Congress as proper subjects of direct tax. . . .

It follows necessarily that the power to tax without apportionment extends to all other objects. Taxes on other objects are included under the heads of taxes not direct, duties, imposts, and excises, and must be laid and collected by the rule of uniformity. The tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties. Certainly it is not, in the sense of the Constitution, a direct tax. It may be said to come within the same category of taxation as the tax on incomes of insurance companies, which this court, at the last term, in the case of *Pacific Insurance Company v. Soule*,** held not to be a direct tax.

Is it, then, a tax on a franchise granted by a State, which Congress, upon any principle exempting the reserved powers of the States from impairment by taxation, must be held to have no authority to lay and collect? We do not say that there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation; for

* Act of July 9th, 1798, 1 Stat. at Large, 586.

† Act of July 22d, 1813, 3 Ib., 26.

‡ Id., 166.

§ Id., 255.

** 7 Wallace, 434.

franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property.

But in the case before us the object of taxation is not the franchise of the bank, but property created, or contracts made and issued under the franchise, or power to issue bank bills. A railroad company, in the exercise of its corporate franchises, issues freight receipts, bills of lading, and passenger tickets; and it cannot be doubted that the organization of railroads is quite as important to the State as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the State which granted the charter of the railroad. And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts. Both descriptions of contracts are means of profit to the corporations which issue them; and both, as we think, may properly be made contributory to the public revenue.

It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.

The first answer to this is that the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution.

But there is another answer which vindicates equally the wisdom and the power of Congress.

It cannot be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit. It is not important here, to decide whether the quality of legal tender, in payment of debts, can be constitutionally imparted to these bills; it is enough to say, that

there can be no question of the power of the government to emit them; to make them receivable in payment of debts to itself; to fit them for use by those who see fit to use them in all the transactions of commerce; to provide for their redemption; to make them a currency, uniform in value and description, and convenient and useful for circulation. These powers, until recently, were only partially and occasionally exercised. Lately, however, they have been called into full activity, and Congress has undertaken to supply a currency for the entire country.

The methods adopted for the supply of this currency were briefly explained in the first part of this opinion. It now consists of coin, of United States notes, and of the notes of the National banks. Both descriptions of notes may be properly described as bills of credit, for both are furnished by the government; both are issued on the credit of the government; and the government is responsible for the redemption of both; primarily as to the first description, and immediately upon default of the bank, as to the second. When these bills shall be made convertible into coin, at the will of the holder, this currency will, perhaps, satisfy the wants of the community, in respect to a circulating medium, as perfectly as any mixed currency that can be devised.

Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile.

Viewed in this light, as well as in the other light of a duty on contracts or property, we cannot doubt the constitutionality of the tax under consideration. The three questions certified from the Circuit Court of the District of Maine must, therefore, be answered

Affirmatively.

[Mr. Justice NELSON rendered a dissenting opinion, in which Justice DAVIS concurred.]

RULE OF UNIFORMITY IN TAXATION.*

HEAD MONEY CASES.

112 U. S. 580. (1885.)

In this case it was held by the Supreme Court of the United States that Congress has power to regulate immigration under the power over commerce, and that a statute passed (August 3, 1882, 22 Stat. 214), providing for the collection by the United States Collector at each port of the sum of fifty cents for each passenger, not a citizen of the United States, who shall come to that port by steam or sailing vessel from a foreign port, to be paid by the master or owner of the vessel, such money to be turned into the United States Treasury to constitute an immigration fund to be used to defray the expense of regulating immigration and for the care of immigrants, and to relieve such as are in distress, was valid as a regulation of commerce and not open to the objection of being a tax in violation of the uniformity clause of the Constitution.†

REPRESENTATIVES AND DIRECT TAXES SHALL BE APPOORTIONED.‡
WHAT ARE DIRECT TAXES?***

HYLTON v. THE UNITED STATES.

3 Dallas, 171. Decided 1796.

This was a writ of error to the circuit court of the United States for the district of Virginia. The question raised, and all the facts necessary to be adverted to, appear in the opinions of the members of the court. . . .

* See, Sec. 136, Vol. 2. *Cyclopedia of Law Series*.

† See, also, *Cooper v. Ash*, 76 Ill. 11.

‡ See, Sec. 101, Vol. 2, *Cyclopedia of Law*. Also *Springer v. United States*, *post*, page 113; and *Pollock v. Farmers' Loan & Trust Co.*, *post*, page 118.

*** Sec. 127, Vol. 2, *Cyclopedia of Law*.

The court delivered these opinions *seriatim*, in the following terms.‡

CHASE, J. By the case stated, only one question is submitted to the opinion of this court: Whether the law of congress of the 5th of June, 1794 (1 U. S. Stat. at Large, 373), entitled, "An act to lay duties upon carriages for the conveyance of persons," is unconstitutional and void?

The principles laid down to prove the above law void, are these: That a tax on carriages is a direct tax, and therefore, by the constitution, must be laid according to the census directed by the constitution to be taken, to ascertain the number of representatives from each State. And that the tax in question, on carriages, is not laid by that rule of apportionment, but by the rule of uniformity, prescribed by the constitution in the case of duties, imposts, and excises; and a tax on carriages is not within either of those descriptions. . . .

The constitution evidently contemplated no taxes as direct taxes, but only such as congress could lay in proportion to the census. The rule of apportionment is only to be adopted in such cases where it can reasonably apply; and the subject taxed must ever determine the application of the rule.

If it is proposed to tax any specific article by the rule of apportionment, and it would certainly create great inequality and injustice, it is unreasonable to say that the constitution intended such tax should be laid by that rule.

It appears to me that a tax on carriages cannot be laid by the rule of apportionment, without very great inequality and injustice. For example, suppose two States, equal in census, to pay eighty thousand dollars each, by a tax on carriages of eighty dollars on every carriage, and in one State there are one hundred carriages and in the other one thousand. The owners of carriages in one State would pay ten times the tax of owners in the other. A, in one State, would pay for his carriage eight dollars; but B, in the other State, would pay for his carriage, eighty dollars.

It was argued that a tax on carriages was a direct tax, and might be laid according to the rule of apportionment, and, as

‡ The Chief Justice, Ellsworth, was sworn into office in the morning; but not having heard the whole of the argument, he declined taking any part in the decision of this cause.

I understood, in this manner: Congress, after determining on the gross sum to be raised, was to apportion it according to the census and then lay it in one State on carriages, in another on horses, in a third on tobacco, in a fourth on rice, and so on. I admit that this mode might be adopted to raise a certain sum in each State, according to the census, but it would not be a tax on carriages, but on a number of specific articles; and it seems to me that it would be liable to the same objection of abuse and oppression, as a selection of any one article in all the States.

I think an annual tax on carriages for the conveyance of persons, may be considered as within the power granted to congress to lay duties. The term duty, is the most comprehensive, next to the general term tax; and practically in Great Britain, whence we take our general ideas of taxes, duties, imposts, excises, customs, etc., embraces ideas of stamps, tolls for passage etc., etc., and is not confined to taxes on importation only.

It seems to me that a tax on expense is an indirect tax; and I think an annual tax on a carriage for the conveyance of persons, is of that kind; because a carriage is a consumable commodity, and such annual tax on it, is on the expense of the owner.

I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the constitution, are only two, to wit, a capitation or poll tax, simply without regard to property, profession, or any other circumstance; and a tax on land. I doubt whether a tax, by a general assessment of personal property, within the United States, is included within the term direct tax.

As I do not think the tax on carriages is a direct tax, it is unnecessary at this time for me to determine whether this court constitutionally possesses the power to declare an act of congress void, on the ground of it being made contrary to, and in violation of the constitution; but if the court have such power, I am free to declare, that I will never exercise it but in a very clear case. I am for affirming the judgment of the circuit court.

PATERSON, J. . . . What are direct taxes within the meaning of the constitution? The constitution declares that a capitation tax is a direct tax; and both in theory and practice, a tax on land is deemed to be a direct tax. In this way, the terms direct taxes, and capitation and other direct tax, are satisfied.

It is not necessary to determine, whether a tax on the product of land be a direct or indirect tax. Perhaps the immediate product of land, in its original and crude state, ought to be considered as the land itself; it makes part of it, or else the provision made against taxing exports would be easily eluded. Land, independently of its produce, is of no value. When the produce is converted into a manufacture it assumes a new shape; its nature is altered, its original state is changed, it becomes quite another subject, and it will be differently considered. Whether direct taxes, in the sense of the constitution, comprehend any other tax than a capitation tax, and tax on land, is a questionable point. If congress, for instance, should tax, in the aggregate or mass, things that generally pervade all the States in the Union, then perhaps the rule of apportionment would be the most proper, especially if an assessment was to intervene. This appears, by the practice of some of the States, to have been considered as a direct tax. Whether it be so under the constitution of the United States is a matter of some difficulty; but as it is not before the court, it would be improper to give any decisive opinion upon it. I never entertained a doubt that the principal, I will not say the only objects, that the framers of the constitution contemplated as falling within the rule of apportionment, were a capitation tax and a tax on land. Local considerations, and the particular circumstances and relative situation of the States, naturally lead to this view of the subject. The provision was made in favor of the Southern States. They possessed a large number of slaves; they had extensive tracts of territory, thinly settled and not very productive. A majority of the States had but few slaves, and several of them a limited territory, well settled, and in a high state of cultivation. The Southern States, if no provision had been introduced in the constitution, would have been wholly at the mercy of the other States. Congress in such case might tax slaves, at discretion or arbitrarily, and land in every part of the Union after the same rate or measure; so much a head in the first instance, and so much an acre in the second. To guard them against imposition, in these particulars, was the reason of introducing the clause in the constitution which directs that representatives and direct taxes shall be apportioned among the States according to their respective numbers. . . .

All taxes on expense or consumption are indirect taxes. A tax

on carriages is of this kind, and of course is not a direct tax. Indirect taxes are circuitous modes of reaching the revenue of individuals, who generally live according to their income. In many cases of this nature the individual may be said to tax himself. I shall close this discourse with reading a passage or two from Smith's *Wealth of Nations*.

"The impossibility of taxing people in proportion to their revenue by any capitation, seems to have given occasion to the invention of taxes upon consumable commodities; the State not knowing how to tax directly and proportionably the revenue of its subjects, endeavors to tax it indirectly by taxing their expense, which it is supposed in most cases will be nearly in proportion to their revenue. Their expense is taxed by taxing the consumable commodities upon which it is laid out." Vol. iii, 331.

"Consumable commodities, whether necessities or luxuries, may be taxed in two different ways; the consumer may either pay an annual sum on account of his using or consuming goods of a certain kind, or the goods may be taxed while they remain in the hands of the dealer, and before they are delivered to the consumer. The consumable goods, which last a considerable time before they are consumed altogether, are most properly taxed in the one way; those of which the consumption is immediate, or more speedy, in the other; the coach tax and plate tax are examples of the former method of imposing; the greater part of the other duties of excise and customs, of the latter." Vol. iii, p. 341.

I am, therefore, of opinion that the judgment rendered in the circuit court of Virginia ought to be affirmed.

IREDELL, J. I agree in opinions with my brothers, who have already expressed theirs, that the tax in question is agreeable to the constitution; and the reasons which have satisfied me can be delivered in a very few words, since I think the constitution itself affords a clear guide to decide the controversy.

The congress possess the power of taxing all taxable objects, without limitation, with the particular exception of a duty on exports.

There are two restrictions only on the exercise of this authority—

1. All direct taxes must be apportioned.
2. All duties, imposts and excises must be uniform.

If the carriage tax be a direct tax, within the meaning of the constitution, it must be apportioned. If it be a duty, impost, or excise, within the meaning of the constitution, it must be uniform.

If it can be considered as a tax, neither direct within the meaning of the constitution, nor comprehended within the term duty, impost, or excise; there is no provision in the constitution, one way or another, and then it must be left to such an operation of the power, as if the authority to lay taxes had been given generally in all instances, without saying whether they should be apportioned or uniform; and in that case, I should presume, the tax ought to be uniform; because the present constitution was particularly intended to affect individuals, and not States, except in particular cases specified; and this is the leading distinction between the articles of confederation and the present constitution.

As all direct taxes must be apportioned, it is evident that the constitution contemplated none as direct but such as could be apportioned.

If this cannot be apportioned, it is, therefore, not a direct tax in the sense of the constitution.

That this tax cannot be apportioned is evident. Suppose ten dollars contemplated as a tax on each chariot, or post chaise, in the United States, and the number of both in all the United States be computed at one hundred and five, the number of representatives in congress,—this would produce in the whole one thousand and fifty dollars; the share of Virginia, being 19-105 parts, would be one hundred and ninety dollars; the share of Connecticut, being 7-105 parts, would be seventy dollars; then suppose Virginia had fifty carriages, Connecticut two, the share of Virginia being one hundred and ninety dollars, this must of course be collected from the owners of carriages and there would therefore be collected from each carriage three dollars and eighty cents; the share of Connecticut being seventy dollars, each carriage would pay thirty-five dollars.

If any State had no carriages, there could be no apportionment at all. This mode is too manifestly absurd to be supported, and has not even been attempted in debate. But two expedients

have been proposed of a very extraordinary nature to evade the difficulty.

1. To raise the money a tax on carriages would produce, not by laying a tax on each carriage uniformly, but by selecting different articles in different States, so that the amount paid in each State may be equal to the sum due upon a principle of apportionment. One State might pay by a tax on carriages, another by a tax on slaves, etc.

I should have thought this merely an exercise of ingenuity, if it had not been pressed with some earnestness; and as this was done by gentlemen of high respectability in their profession, it deserves a serious answer, though it is very difficult to give such a one.

1. This is not an apportionment, of a tax on carriages, but of the money a tax on carriages might be supposed to produce, which is quite a different thing.

2. It admits that congress cannot lay an uniform tax on all carriages in the Union, in any mode, but that they may on carriages in one or more States. They may therefore lay a tax on carriages in fourteen States, but not in the fifteenth.

3. If congress, according to this new decree, may select carriages as a proper object, in one or more States, but omit them in others, I presume they may omit them in all, and select other articles.

Suppose, then, a tax on carriages would produce \$100,000, and a tax on horses a like sum, \$100,000, and \$100,000 were to be apportioned according to that mode; gentlemen might amuse themselves with calling this a tax on carriages, or a tax on horses, while not a single carriage, nor a single horse was taxed throughout the Union.

4. Such an arbitrary method of taxing different States differently, is a suggestion altogether new, and would lead, if practiced, to such dangerous consequences that it will require very powerful arguments to show that that method of taxing would be in any manner compatible with the constitution, with which at present, I deem it utterly irreconcilable, it being altogether destructive of the notion of a common interest, upon which the very principles of the constitution are founded, so far as the condition of the United States will admit.

The second expedient proposed was, that of taxing carriages,

among other things, in a general assessment. This amounts to saying that congress may lay a tax on carriages, but that they may not do it unless they blend it with other subjects of taxation. For this, no reason or authority has been given, and in addition to other suggestions offered by the counsel on that side, affords an irrefragable proof, that when positions plainly so untenable are offered to counteract the principle contended for by the opposite counsel, the principle itself is a right one; for, no one can doubt, that if better reasons could have been offered, they would not have escaped the sagacity and learning of the gentlemen who offered them.

There is no necessity or propriety in determining what is, or is not a direct or indirect tax in all cases.

Some difficulties may occur which we do not at present foresee. Perhaps a direct tax, in the sense of the constitution, can mean nothing but a tax on something inseparably annexed to the soil, something capable of apportionment under all such circumstances.

A land or a poll tax may be considered of this description.

The latter is to be considered so particularly under the present constitution, on account of the slaves in the Southern States, who give a ratio in the representation in the proportion of three to five.

Either of these is capable of apportionment. In regard to other articles, there may possibly be considerable doubt.

It is sufficient, on the present occasion, for the court to be satisfied that this is not a direct tax contemplated by the constitution, in order to affirm the present judgment; since, if it cannot be apportioned, it must necessarily be uniform.

I am clearly of opinion this is not a direct tax in the sense of the constitution, and, therefore, that the judgment ought to be affirmed.*

By the COURT. Let the judgment of the circuit court be affirmed.

* WILSON, J., had rendered an opinion in this case in the Circuit Court of Virginia, and now merely expressed his concurrence in the opinion of the court. CUSHING, J., not having heard the arguments, did not deliver an opinion.

SPRINGER v. UNITED STATES.

102 U. S. 586. (1881.)

Mr. Justice SWAYNE, after stating the facts, delivered the opinion of the court.

The central and controlling question in this case is whether the tax which was levied on the income, gains, and profits of the plaintiff in error, as set forth in the record, and by pretended virtue of the acts of Congress and parts of acts therein mentioned, is a direct tax. . . . If it was, not having been laid according to the requirements of the Constitution, it must be admitted that the laws imposing it, and the proceedings taken under them by the assessor and collector for its imposition and collection, were all void.

Many of the provisions of the Articles of Confederation of 1777 were embodied in the existing organic law. They provided for a common treasury and the mode of supplying it with funds. The latter was by requisitions upon the several States. The delays and difficulties in procuring the compliance of the States, it is known, was one of the causes that led to the adoption of the present Constitution. This clause of the articles throws no light on the question we are called upon to consider. Nor does the journal of the proceedings of the constitutional convention of 1787 contain anything of much value relating to the subject.

It appears that on the 11th of July, in that year, there was a debate of some warmth involving the topic of slavery. On the day following, Gouverneur Morris, of New York, submitted a proposition "that taxation shall be in proportion to representation." It is further recorded in this day's proceedings, that Mr. Morris having so varied his motion by inserting the word "direct," it passed *nem. con.*, as follows: "Provided always, that direct taxes ought to be proportioned to representation." 2 Madison Papers, by Gilpin, pp. 1079-1081.

On the 24th of the same month, Mr. Morris said that "he hoped the committee would strike out the whole clause. . . . He had only meant it as a bridge to assist us over a gulf; having passed the gulf, the bridge may be removed. He thought the principle laid down with so much strictness liable to strong objections." *Id.* 1197. The gulf was the share of representation

claimed by the Southern States on account of their slave population. But the bridge remained. The builder could not remove it, much as he desired to do so. All parties seem thereafter to have avoided the subject. With one or two immaterial exceptions, not necessary to be noted, it does not appear that it was again adverted to in any way. It was silently incorporated into the draft of the Constitution as that instrument was finally adopted.

It does not appear that an attempt was made by any one to define the exact meaning of the language employed.

In the twenty-first number of the *Federalist* Alexander Hamilton, speaking of taxes generally, said: "Those of the direct kind, which principally relate to land and buildings, may admit of a rule of apportionment. Either the value of the land, or the number of the people, may serve as a standard." The thirty-sixth number of that work, by the same author, is devoted to the subject of internal taxes. It is there said, "They may be subdivided into those of the direct and those of the indirect kind." In this connection land-taxes and poll-taxes are discussed. The former are commended and the latter are condemned. Nothing is said of any other direct tax. In neither case is there a definition given or attempted of the phrase, "direct tax."

The very elaborate researches of the plaintiff in error have furnished us with nothing from the debates of the State conventions, by whom the Constitution was adopted, which gives us any aid. Hence we may safely assume that no such material exists in that direction, though it is known that Virginia proposed to Congress an amendment relating to the subject, and that Massachusetts, South Carolina, New York, and North Carolina expressed strong disapprobation of the power given to impose such burdens. 1 *Tucker's Blackstone*, pt. 1, app. 235.

Perhaps the two most authoritative persons in the convention touching the Constitution were Hamilton and Madison. The latter, in a letter of May 11, 1794, speaking of the tax which was adjudicated upon in *Hylton v. United States* (3 Dall., 171), said, "The tax on carriages succeeded in spite of the Constitution by a majority of twenty, the advocates of the principle being reinforced by the adversaries of luxury." 2 *Mad. Writings* (pub. by Congress), p. 14. In another letter, of the 7th of February, 1796, referring to the case of *Hylton v. United States* then pend-

ing, he remarked: "There never was a question on which my mind was better satisfied, and yet I have very little expectation that it will be viewed in the same light by the court that it is by me." *Id.*, 77. Whence the despondency thus expressed is unexplained.

Hamilton left behind him a series of legal briefs and among them one entitled "Carriage tax." See vol. vii., p. 848, of his works. This paper was evidently prepared with a view to the *Hylton* case, in which he appeared as one of the counsel for the United States. In it he says: "What is the distinction between direct and indirect taxes? It is a matter of regret that terms so uncertain and vague in so important a point are to be found in the Constitution. We shall seek in vain for any antecedent settled legal meaning to the respective terms. There is none. We shall be as much at a loss to find any disposition of either which can satisfactorily determine the point." There being many carriages in some of the States, and very few in others, he points out the preposterous consequences if such a tax be laid and collected on the principle of apportionment instead of the rule of uniformity. He insists that if the tax there in question was a direct tax, so would be a tax on ships, according to their tonnage. He suggests that the boundary line between direct and indirect taxes be settled by "a species of arbitration," and that direct taxes be held to be only "capitation or poll taxes, and taxes on lands and buildings, and general assessments, whether on the whole property of individuals or on their whole real or personal estate. All else must, of necessity, be considered as indirect taxes."

The tax here in question falls within neither of these categories. It is not a tax on the "whole . . . personal estate" of the individual, but only on his income, gains, and profits during a year, which may have been but a small part of his personal estate, and in most cases would have been so. This classification lends no support to the argument of the plaintiff in error.

The Constitution went into operation on the 4th of March, 1789.

It is important to look into the legislation of Congress touching the subject since that time. The following summary will suffice for our purpose. We shall refer to the several acts of

Congress to be examined, according to their sequence in dates. In all of them the aggregate amount required to be collected was apportioned among the several States.

The act of July 14, 1798, c. 75, 1 Stat. 53. This act imposed a tax upon real estate and a capitation tax upon slaves.

The act of Aug. 2, 1813, c. 37, 3 Id. 53. By this act the tax was imposed upon real estate and slaves, according to their respective values in money.

The act of Jan. 19, 1815, c. 21, Id. 164. This act imposed the tax upon the same descriptions of property, and in like manner as the preceding act.

The act of Feb. 27, 1815, c. 60, Id. 216, applied to the District of Columbia the provisions of the act of Jan. 19, 1815.

The act of March 5, 1816, c. 24, Id. 255, repealed the two preceding acts, and re-enacted their provisions to enforce the collection of the smaller amount of tax thereby prescribed.

The act of Aug. 5, 1861, c. 45, 12 Id. 294, required the tax to be levied wholly on real estate.

The act of June 7, 1862, c. 98, Id. 422, and the act of Feb. 6, 1863, c. 21, Id. 640, both relate only to the collection, in insurrectionary districts, of the direct tax imposed by the act of Aug. 5, 1861, and need not, therefore, be more particularly noticed.

It will thus be seen that whenever the government has imposed a tax which it recognized as a direct tax, it has never been applied to any objects but real estate and slaves. The latter application may be accounted for upon two grounds: 1. In some of the States slaves were regarded as real estate (1 Hurd, Slavery, 239; *Veazie Bank v. Fenno*, 8 Wall., 533); and, 2. Such an extension of the tax lessened the burden upon the real estate where slavery existed, while the result to the national treasury was the same, whether the slaves were omitted or included. The wishes of the South were, therefore, allowed to prevail. We are not aware that the question of the validity of such a tax was ever presented for adjudication. Slavery having passed away, it cannot hereafter arise. It does not appear that any tax like the one here in question was ever regarded or treated by Congress as a direct tax. This uniform practical construction of the Constitution touching so important a point, through so long a period, by the legislative and executive departments of the

government, though not conclusive, is a consideration of great weight.

There are four adjudications by this court to be considered. They have an important, if not a conclusive, application to the case in hand. . . . [Here follows a discussion of *Hylton v. United States*, 3 Dallas, 171.] In *Pacific Insurance Co. v. Soule* (7 Wall., 433), the taxes in question were upon the receipts of such companies from premiums and assessments, and upon all sums made or added, during the year, to their surplus or contingent funds. This court held unanimously that the taxes were not direct taxes, and that they were valid. . . . [Here follows an extract from *Veazie Bank v. Fenno*, 8 Wallace, 533.] In *Scholey v. Rew* (23 Wall., 331), the tax involved was a succession tax, imposed by the acts of Congress of June 30, 1864, and July 13, 1866. It was held that the tax was not a direct tax, and that it was constitutional and valid. In delivering the opinion of the court, Mr. Justice Clifford, after remarking that the tax there in question was not a direct tax, said: "Instead of that, it is plainly an excise tax or duty, authorized by sect. 1, art. 8, of the Constitution, which vests the power in Congress to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defense and general welfare." He said further: "Taxes on houses, lands, and other permanent real estate have always been deemed to be direct taxes, and capitation taxes, by the express words of the Constitution, are within the same category; but it has never been decided that any other legal exactions for the support of the Federal government fall within the condition that unless laid in proportion to numbers the assessment is invalid."

All these cases are undistinguishable in principle from the case now before us, and they are decisive against the plaintiff in error.

The question, what is a direct tax, is one exclusively in American jurisprudence. The text-writers of the country are in entire accord upon the subject.

Mr. Justice Story says all taxes are usually divided into two classes,—those which are direct and those which are indirect,—and that "under the former denomination are included taxes on land or real property and, under the latter, taxes on consumption." 1 Const., sect. 950.

Chancellor Kent, speaking of the case of *Hylton v. United*,

States, says: "The better opinion seemed to be that the direct taxes contemplated by the Constitution were only two, viz., a capitation or poll tax and a tax on land." 1 Com., 257. See also Cooley, *Taxation*, p. 5, note 2; Pomeroy, *Const. Law*, 157; Sharswood's *Blackstone*, 308, note; Rawle, *Const.*, 30; Sergeant, *Const.*, 305.

We are not aware that any writer, since *Hylton v. United States* was decided, has expressed a view of the subject different from that of these authors.

Our conclusions are, that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty. Pomeroy, *Const. Law*, 177; *Pacific Insurance Co. v. Soule*, and *Scholey v. Rew*, *supra*.

Against the considerations, in one scale, in favor of these propositions, what has been placed in the other, as a counterpoise? Our answer is, certainly nothing of such weight, in our judgment, as to require any special reply. The numerous citations from the writings of foreign political economists, made by the plaintiff in error, are sufficiently answered by Hamilton in his brief, before referred to.

Judgment affirmed.

POLLOCK v. FARMERS' LOAN AND TRUST COMPANY.
(Rehearing.)

HYDE v. CONTINENTAL TRUST COMPANY. (Rehearing.)

*158 U. S., 601. Decided 1895.**

[This was a bill filed by Charles Pollock, a citizen of the State of Massachusetts, on behalf of himself and all other stock-holders of the defendant company similarly situated, against the Farmers' Loan and Trust Co., a corporation of the State of New York. The bill alleged that the defendant claimed authority under the

* This case overrules, by a divided court, the decision reached in *Springer v. United States*, *supra*, and holds that an income tax is a *direct tax* and void under the rule of uniformity.

provisions of the act of Congress of August 15, 1894, known as the *Income Tax*, to pay to the United States a tax of two per centum on the net profits of said company, including the income derived from real estate and bonds of the City of New York owned by it. The bill further alleged that such a tax was unconstitutional, null, and void, in that it was a direct tax with respect to the income from real estate, and in that the income from stocks and bonds of the States of the United States and counties and municipalities therein is not subject to the taxing power of Congress.

On April 8, 1895, the Court, one justice being absent, decided:

"A tax on the rents or income of real estate is a direct tax, within the meaning of that term as used in the Constitution of the United States.

"A tax upon incomes derived from the interest of bonds issued by a municipal corporation is a tax upon the power of the State and its instrumentalities to borrow money, and is consequently repugnant to the Constitution of the United States.

"Upon each of the other questions argued at bar, to wit: 1. Whether the void provision as to rent and income from real estate invalidates the whole act? 2. Whether as to the income from personal property as such, the act is unconstitutional, as laying direct taxes? 3. Whether any part of the tax, if not considered as a direct tax, is invalid for want of uniformity on either of the grounds suggested?—the Justices who heard the argument are equally divided, and, therefore, no opinion is expressed." (157 U. S., 429.)

A rehearing was granted.

The cases were re-argued before the full bench, and on May 20, 1895, the following opinion was rendered:

Mr. Chief Justice FULLER delivered the opinion of the court.

Whenever this court is required to pass upon the validity of an act of Congress as tested by the fundamental law enacted by the people, the duty imposed demands in its discharge the utmost deliberation and care and invokes the deepest sense of responsibility. And this is especially so when the question involves the exercise of a great governmental power and brings into consideration, as vitally affected by the decision, that complex system of government so sagaciously framed to secure and perpetuate "an indestructible union composed of indestructible States."

We have, therefore, in anxious desire to omit nothing which might in any degree tend to elucidate the questions submitted, and aided by further able arguments embodying the fruits of elaborate research, carefully re-examined these cases, with the result that, while our former conclusions remain unchanged, their scope must be enlarged by the acceptance of their logical consequences. The very nature of the constitution, as observed by Chief Justice Marshall in one of his greatest judgments, "requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deducted from the nature of the objects themselves." "In considering this question, then, we must never forget that it is a Constitution that we are expounding." *McCulloch v. Maryland*, 4 Wheat., 316, 407.

As heretofore stated, the Constitution divided Federal taxation into two great classes, the class of direct taxes and the class of duties, imposts, and excises, and prescribed two rules which qualified the grant of power as to each class.

The power to lay direct taxes, apportioned among the several States in proportion to their representation in the popular branch of Congress, a representation based on population as ascertained by the census, was plenary and absolute, but to lay direct taxes without apportionment was forbidden. The power to lay duties, imposts, and excises was subject to the qualification that the imposition must be uniform throughout the United States.

Our previous decision was confined to the consideration of the validity of the tax on the income from real estate and on the income from municipal bonds. The question thus limited, was whether such taxation was direct or not, in the meaning of the Constitution, and the court went no further as to the tax on the incomes from real estate than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct; while as to the income from municipal bonds, that could not be taxed, because of want of power to tax the source, and no reference was made to the nature of the tax being direct or indirect.

We are now permitted to broaden the field of inquiry and determine to which of the two great classes a tax upon a person's entire income, whether derived from rents or products or other-

wise, of real estate, or from bonds, stocks or other forms of personal property, belongs; and we are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property, in the manner prescribed, is so different from a tax upon the property itself that it is not a direct but an indirect tax in the meaning of the Constitution.

The words of the Constitution are to be taken in their obvious sense and to have a reasonable construction. In *Gibbons v. Ogden*, Chief Justice Marshall, with his usual felicity, said:

"As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution and the people who adopted it must be understood to have employed words in their natural sense and to have intended what they have said." 9 Wheat., 1, 188. . . .

We know of no reason for holding otherwise than that the words "direct taxes" on the one hand, and "duties, imposts, and excises" on the other, were used in the Constitution in their natural and obvious sense, nor, in arriving at what those terms embrace, do we perceive any ground for enlarging them beyond, or narrowing them within, their natural and obvious import at the time the Constitution was framed and ratified. . . .

Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?

There can be only one answer, unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of its framers defeated. We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property and the property itself.

Nor can we conceive any ground why the same reasoning does not apply to capital in personalty held for the purpose of income

or ordinarily yielding income, and to the income therefrom. All the real estate of the country, and all its invested personal property, are open to the direct operation of the taxing power if an apportionment be made according to the Constitution. The Constitution does not say that no direct tax shall be laid by apportionment on any other property than land; on the contrary, it forbids all unapportioned direct taxes; and we know of no warrant for excepting personal property from the exercise of the power, or any reason why an apportioned direct tax cannot be laid and assessed, as Mr. Gallatin said in his report when Secretary of the Treasury in 1812, "upon the same objects of taxation on which the direct taxes levied under the authority of the State are laid and assessed." . . .

Nor are we impressed with the argument that because in the four instances in which the power of direct taxation has been exercised, Congress did not see fit, for reasons of expediency, to levy a tax upon personalty, this amounts to such a practical construction of the Constitution that the power did not exist, that we must regard ourselves bound by it. We should regret to be compelled to hold the powers of the general government thus restricted, and certainly cannot accede to the idea that the Constitution has become weakened by a particular course of inaction under it.

The stress of the argument is thrown, however, on the assertion that an income tax is not a property tax at all; that it is not a real estate tax, nor a crop tax, nor a bond tax; that it is an assessment upon the taxpayer on account of his money-spending power as shown by his revenue for the year preceding the assessment; that rents received, crops harvested, interest collected, have lost all connection with their origin, and although once not taxable have become transmuted in their new form into taxable subject-matter; in other words, that income is taxable irrespective of the source whence it is derived.

This was the view entertained by Mr. Pitt as expressed in his celebrated speech on introducing his income-tax law of 1799, and he did not hesitate to carry it to its logical conclusion. The English loan acts provided that the public dividends should be paid "free of all taxes and charges whatsoever;" but Mr. Pitt successfully contended that the dividends for the purposes of the income tax were to be considered simply in relation to the recipient as so

much income, and that the holder had no reason to complain. And this, said Mr. Gladstone fifty-five years after, was the rational construction of the pledge. *Financial Statements*, 32. . . .

We have unanimously held in this case that, so far as this law operates on the receipts from municipal bonds, it cannot be sustained, because it is a tax on the power of the States, and on their instrumentalities to borrow money, and consequently repugnant to the Constitution. But if, as contended, the interest when received has become merely money in the recipient's pocket, and taxable as such without reference to the source from which it came, the question is immaterial whether it should have been originally taxed at all or not. This was admitted by the Attorney General with characteristic candor; and it follows that, if the revenue derived from municipal bonds cannot be taxed because the source cannot be, the same rule applies to revenue from any other source not subject to the tax; and the lack of power to levy any but an apportioned tax on real estate and personal property equally exists as to the revenue therefrom.

Admitting that this act taxes the income of property irrespective of its source, still we cannot doubt that such a tax is necessarily a direct tax in the meaning of the Constitution. . . .

Being direct, and therefore to be laid by apportionment, is there any real difficulty in doing so? Cannot Congress, if the necessity exist of raising thirty, forty, or any other number of million dollars for the support of the government, in addition to the revenue from duties, imposts, and excises, apportion the quota of each State upon the basis of the census, and thus advise it of the payment which must be made, and proceed to assess that amount on all the real or personal property and the income of all persons in the State, and collect the same if the State does not in the meantime assume and pay its quota and collect the amount according to its own system and in its own way? Cannot Congress do this as respects either or all these subjects of taxation, and deal with each in such manner as might be deemed expedient, as indeed was done in the act of July 14, 1798 (C., 75, 1 Stat., 597)? Inconveniences might possibly attend the levy of an income tax, notwithstanding the listing of receipts, when adjusted, furnishes its own valuation; but that it is apportionable is hardly denied, although it is asserted that it would operate so unequally as to be undesirable. . . .

The power to tax real and personal property and the income from both, there being an apportionment, is conceded; that such a tax is a direct tax in the meaning of the Constitution has not been, and, in our judgment, cannot be successfully denied; and yet we are thus invited to hesitate in the enforcement of the mandate of the Constitution which prohibits Congress from laying a direct tax on the revenue from property of the citizen without regard to States lines, and in such manner that the States cannot intervene by payment in regulation of their own resources, lest a government of delegated powers should be found to be, not less powerful, but less absolute, than the imagination of the advocate had supposed.

We are not here concerned with the question whether an income tax be or be not desirable, nor whether such a tax would enable the government to diminish taxes on consumption and duties on imports and to enter upon what may be believed to be a reform of its fiscal and commercial system. Questions of that character belong to the controversies of political parties, and cannot be settled by judicial decision. In these cases our province is to determine whether this income tax on the revenue from property does or does not belong to the class of direct taxes. If it does, it is, being unapportioned, in violation of the Constitution, and we must so declare. . . .

We have considered the act only in respect to the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.

Being of opinion that much of the sections of this law as lays a tax on income from real and personal property is invalid, we are brought to the question of the effect of that conclusion upon these sections as a whole.

It is elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected. And in the case before us there is no question as to the validity of this act, except sections twenty-seven to thirty-seven, inclusive, which re-

late to the subject which has been under discussion; and as to them we think that the rule laid down by Chief Justice Shaw in *Warren v. Charlestown*, 2 Gray, 84, is applicable, that if the different parts "are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them." Or, as the point is put by Mr. Justice Matthews in *Poindexter v. Greenhow*, 114 U. S., 270, 304: "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute, for the law intended by the legislature, one they may never have been willing by itself to enact." And again, as stated by the same eminent judge in *Sprague v. Thompson*, 118 U. S., 90, 95, where it was urged that certain illegal exceptions in a section of a statute might be disregarded, but that the rest could stand: "The insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions."

According to the census, the true valuation of real and personal property in the United States in 1890 was \$65,037,091,197, of which real estate with improvements thereon made up \$39,544,544,333. Of course, from the latter must be deducted, in applying these sections, all unproductive property and all property whose net yield does not exceed four thousand dollars; but, even with such deductions, it is evident that the income from realty formed a vital part of the scheme for taxation embodied therein. If that be stricken out, and also the income from all invested

personal property, bonds, stocks, investments of all kinds, it is obvious that by far the largest part of the anticipated revenue would be eliminated, and this would leave the burden of the tax to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would remain in substance a tax on occupations and labor. We cannot believe that such was the intention of Congress. We do not mean to say that such an act laying by apportionment a direct tax on all real estate and personal property, or the income thereof, might not also lay excise taxes on business, privileges, employments, and vocations. But this is not such an act; and the scheme must be considered as a whole. Being invalid as to the greater part, and falling, as the tax would, if any part were held valid, in a direction which could not have been contemplated except in connection with the taxation considered as an entirety, we are constrained to conclude that sections twenty-seven to thirty-seven, inclusive, of the act which became a law without the signature of the President on August 28, 1894, are wholly inoperative and void.

Our conclusions may, therefore, be summed up as follows:

First. We adhere to the opinion already announced, that, taxes on real estate being indisputably direct taxes, taxes on the rents or incomes of real estate are equally direct taxes.

Second. We are of opinion that taxes on personal property, or on the income of personal property, are likewise direct taxes.

Third. The tax imposed by sections twenty-seven to thirty-seven, inclusive, of the act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid.

The decrees hereinbefore entered in this court will be vacated; the decrees below will be reversed, and the cases remanded, with instructions to grant the relief prayed.

[Dissenting opinions were delivered by Justices HALLAN, BROWN, JACKSON, and WHITE.]

TAXATION OF GOVERNMENTAL AGENCIES.

M'CULLOCH v. MARYLAND.

4 Wheat.. 316. (Previously given.)

THE COLLECTOR v. DAY.

11 Wall., 113. (1870.)

[This case resulted from the attempt to collect an internal revenue tax, under an act of Congress passed from 1864 to 1867, on the salary of a judge of the State of Massachusetts.]

Mr. Justice NELSON delivered the opinion of the court.

The case presents the question whether or not it is competent for Congress, under the Constitution of the United States, to impose a tax upon the salary of a judicial officer of a state.

In *Dobbins v. The Commissioners of Erie County*, 16 Pet., 435, it was decided that it was not competent for the legislature of a State to levy a tax upon the salary or emoluments of an officer of the United States. . . .

The case of *McCulloch v. Maryland*, 4 Wheaton, 316, and *Weston v. Charleston*, 2 Peters, 449, were referred to as settling the principle that governed the case, namely, "that the State governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers." . . .

It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions remained unaltered and unimpaired except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the Tenth Article of the Amendments, namely: "The powers not delegated to the United States are reserved to the States respectively, or, to the people."

The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

The general government, and the States, although both exist within the same territorial limits, are separate and distinct sov-

ereignities, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the States.

The relations existing between the two governments are well stated by the present Chief Justice in the case of *Lane County v. Oregon*, 7 Wallace, 76. "Both the States and the United States," he observed, "existed before the Constitution. The people, through that instrument, established a more perfect union, by substituting a national government, acting with ample powers directly upon the citizens, instead of the Confederate government, which acted with powers greatly restricted only upon the States. But, in many of the articles of the Constitution, the necessary existence of the States, and within their proper spheres, the independent authority of the States, are distinctly recognized. To them nearly the whole charge of interior regulation is committed or left to them, and to the people, all powers, not expressly delegated to the national government, are reserved." Upon looking into the Constitution, it will be found that but few of the articles in that instrument could be carried into practical effect without the existence of the States. . . .

But we are referred to the *Veazie Bank v. Fenno*, 8 Wallace, 533, in support of this power of taxation. That case furnishes a strong illustration of the position taken by the Chief Justice in *McCulloch v. Maryland*, namely, "That the power to tax involves the power to destroy."

The power involved was one which had been exercised by the States since the foundation of the government, and had been, after the lapse of three-quarters of a century, annihilated from excessive taxation by the general government, just as the judicial office in the present case might be, if subject at all to taxation by that government. But, notwithstanding the sanction of this taxation by a majority of the court, it is conceded, in the opinion, that "the reserved rights of the States, such as the right to pass laws; to give effect to laws through executive action; to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress." This conces-

sion covers the case before us, and adds the authority of this court in support of the doctrine which we have endeavored to maintain.

Judgment affirmed.

Mr. Justice BRADLEY filed a dissenting opinion.

WESTON ET AL v. THE CITY COUNCIL OF CHARLESTON.

2 Peters, 449. Decided 1829.

Error to the constitutional court of South Carolina. By an ordinance of the city of Charleston, "stock of the United States" was, among other things, made taxable. The plaintiffs, as owners of such stock, applied to the court of common pleas of the Charleston district for a prohibition to restrain the city council from taxing that stock, on the ground that the tax would be inconsistent with the constitution of the United States. The prohibition having been granted, the proceedings were removed into the constitutional court, where four of the seven judges being of opinion that the tax would be valid, reversed the order for a prohibition, and thereupon this writ of error was brought.

MARSHALL, C. J., delivered the opinion of the court. . . .

. . . This brings us to the main question. Is the stock issued for loans made to the government of the United States liable to be taxed by States and corporations?

Congress has power "to borrow money on the credit of the United States." The stock it issues is the evidence of a debt created by the exercise of this power. The tax in question is a tax upon the contract subsisting between the government and the individual. It bears directly upon that contract, while subsisting and in full force. The power operates upon the contract the instant it is framed, and must imply a right to affect that contract.

If the States and corporations throughout the Union, possess the power to tax a contract for the loan of money, what shall arrest this principle in its application to every other contract? What measure can government adopt which will not be exposed to its influence?

But it is unnecessary to pursue this principle through its diversified application to all the contracts, and to the various operations of government. No one can be selected which is of more vital interest to the community than this of borrowing money on the credit of the United States. No power has been conferred by the American people on their government, the free and unburdened exercise of which more deeply affects every member of our republic. In war, when the honor, the safety, the independence of the nation are to be defended, when all its resources are to be strained to the utmost, credit must be brought in aid of taxation, and the abundant revenue of peace and prosperity must be anticipated to supply the exigencies, the urgent demands of the moment. The people, for objects the most important which can occur in the progress of nations, have empowered their government to make these anticipations, "to borrow money on the credit of the United States." Can anything be more dangerous, or more injurious, than the admission of a principle which authorizes every State and every corporation in the Union which possesses the right of taxation, to burden the exercise of this power at their discretion?

If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which the will of each State and corporation may prescribe. A power which is given by the whole American people for their common good, which is to be exercised at the most critical periods for the most important purposes, on the free exercise of which the interests certainly, perhaps the liberty of the whole may depend; may be burdened, impeded, if not arrested by any of the organized parts of the confederacy.

In a society formed like ours, with one supreme government for national purposes, and numerous state governments for other purposes, in many respects independent, and in the uncontrolled exercise of many important powers, occasional interferences ought not to surprise us. The power of taxation is one of the most essential to a State, and one of the most extensive in its operation. The attempt to maintain a rule which shall limit its exercise, is undoubtedly among the most delicate and difficult duties which can devolve on those whose province it is to expound the supreme law of the land in its application to the cases

of individuals. This duty has more than once devolved on this court. In the performance of it we have considered it as a necessary consequence from the supremacy of the government of the whole, that its action in the exercise of its legitimate powers, should be free and unembarrassed by any conflicting powers in the possession of its parts; that the powers of a State cannot rightfully be so exercised as to impede and obstruct the free course of those measures which the government of the States united may rightfully adopt. . . .

[Citing *McCulloch v. Maryland*, 4 Wheaton, 316, decided by him, the Chief Justice continued:]

We retain the opinions which were then expressed. A contract made by the government in the exercise of its power, to borrow money on the credit of the United States, is undoubtedly independent of the will of any State in which the individual who lends may reside, and is undoubtedly an operation essential to the important objects for which the government was created. It ought, therefore, on the principles settled in the case of *McCulloch v. The State of Maryland*, to be exempt from state taxation, and consequently from being taxed by corporations deriving their power from States.

It is admitted that the power of the government to borrow money cannot be directly opposed, and that any law directly obstructing its operation would be void; but a distinction is taken between direct opposition and those measures which may consequentially affect it; that is, that a law prohibiting loans to the United States would be void, but a tax on them to any amount is allowable.

It is, we think, impossible not to perceive the intimate connection which exists between these two modes of acting on the subject.

It is not the want of original power in an independent sovereign State, to prohibit loans to a foreign government, which restrains the legislature from direct opposition to those made by the United States. The restraint is imposed by our constitution. The American people have conferred the power of borrowing money on their government, and by making that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power,

and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised.

The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderate, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely.

It is admitted by the counsel for the defendants, that the power to tax stock must affect the terms on which loans will be made; but this objection, it is said, has no more weight when urged against the application of an acknowledged power to government stock, than if urged against its application to lands sold by the United States.

The distinction is, we think, apparent. When lands are sold, no connection remains between the purchaser and the government. The lands purchased become a part of the mass of property in the country with no implied exemption from common burdens. All lands are derived from the general or particular government, and all lands are subject to taxation. Lands sold are in the condition of money borrowed and repaid. Its liability to taxation in any form it may then assume is not questioned. The connection between the borrower and the lender is dissolved. It is no burden on loans, it is no impediment to the power of borrowing, that the money, when repaid, loses its exemption from taxation. But a tax upon debts due from the government, stands, we think, on very different principles from a tax on lands which the government has sold.

“The Federalist” has been quoted in the argument, and an eloquent and well-merited eulogy has been bestowed on the great statesman who is supposed to be the author of the number from which the quotation was made. This high authority was also relied upon in the case of *McCulloch v. The State of Maryland*, and was considered by the court. Without repeating what was then said, we refer to it as exhibiting our view of the sentiments expressed on this subject by the authors of that work.

It has been supposed that a tax on stock comes within the exceptions stated in the case of *McCulloch v. The State of Maryland*. We do not think so. The bank of the United States is an

instrument essential to the fiscal operations of the government, and the power which might be exercised to its destruction was denied. But property acquired by that corporation in a State was supposed to be placed in the same condition with property acquired by an individual.

The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the constitution.

We are, therefore, of opinion that the judgment of the constitutional court of the State of South Carolina, reversing the order made by the court of common pleas, awarding a prohibition to the city council of Charleston, to restrain them from levying a tax imposed on six and seven per cent. stock of the United States, under an ordinance to raise supplies to the use of the city of Charleston for the year 1823, is erroneous in this; that the said constitutional court adjudged that the said ordinance was not repugnant to the constitution of the United States; whereas, this court is of opinion that such repugnancy does exist. We are, therefore, of opinion that the said judgment ought to be reversed and annulled and the cause remanded to the constitutional court for the State of South Carolina, that further proceedings may be had therein according to law.

[Justices JOHNSON and THOMPSON delivered dissenting opinions.]

STATE TONNAGE TAX CASES.

12 Wallace, 204. Decided 1870.

ERROR to the Supreme Court of Alabama.

These were two cases, which, though coming in different forms, involved one and the same point only; and at the bar—where the counsel directed attention to the principle involved, separated from the accidents of the case—were discussed together as presenting “precisely the same question.” The matter was thus:—

The Constitution ordains that “no State shall without the consent of Congress lay any duty of tonnage.” With this provision

in force as superior law, the State of Alabama passed, on the 22d of February, 1866, a revenue law. By this law, the rate of taxation for property generally was the one-half of one per cent; but "on all steamboats, vessels, and other water crafts plying in the navigable waters of the State," the act levied a tax at "the rate of \$1 per ton of the registered tonnage thereof," which it declared should "be assessed and collected at the port where such vessels are registered, if practicable; otherwise at any other port or landing within the State where such vessel may be."

The tax collector was directed by the act to demand, in each year, of the person in charge of the vessel, if the taxes had been paid. If a receipt for the same was not produced, he was to immediately assess the same according to tonnage, and if such tax was not paid on demand he was to seize the boat, &c., and, after notice, proceed and sell the same for payment of the tax, &c., and pay the surplus into the county treasury for the use of the owner. If the vessel could not be seized, the collector was to make the amount of the tax out of the real and personal estate of the owner, &c.

Under this act, one Lott, tax collector of the State of Alabama, demanded of Cox, the owner of the Dorrance, a steamer of 321 tons, and valued at \$5,000, and of several other steamers, certain sums as taxes; and under an act of 1867, identical in language with one of 1866, just quoted demanded from the Trade Company of Mobile certain sums on like vessels owned by them; the tax in all the cases being proportioned to the registered tonnage of the vessel.

The steamboats, the subject of the tax, were owned exclusively by citizens of the State of Alabama, and were engaged in the navigation of the Alabama, Bigbee, and Mobile rivers, carrying freight and passengers between Mobile and other points of said rivers, altogether within the limits of that State. These waters were navigable from the sea for vessels of "ten or more tons' burden;" and it was not denied that there were ports of delivery on them above the highest points to which these boats plied. The owners of the boats were not assessed for any other tax on them than the one here claimed. The boats were enrolled and licensed for the coasting trade. Though running, therefore, between points altogether within the limits of the State of Alabama, the

boats were, as it seemed, of that sort on which Congress lays a tonnage duty.*

Cox, under compulsion and protest, paid the tax demanded of him, and then brought assumpsit in one of the inferior State courts of Alabama, to get back the money. The Trade Company refused to pay, and filed a bill in a like court, to enjoin the collector from proceeding to collect. The ground of resistance to the tax in each case was this, that being laid in proportion to the tonnage of the vessel the tax was laid in a form and manner which the State was prohibited by the already quoted section of the Constitution from adopting. The right of the State to lay a tax on vessels according to their value and as property was not denied, but on the contrary conceded. Judgment being given in each case against the validity of the tax, the matter was taken to the Supreme Court of Alabama, which decided that it was lawful. To review that judgment the case was now here. . . .

Mr. Justice CLIFFORD delivered the judgment of the court, giving an opinion in each of the cases.

I. IN THE FIRST CASE. . . . Congress has prescribed the rules of admeasurement and computation for estimating the tonnage of American ships and vessels.†

Viewed in the light of those enactments, the word tonnage, as applied to American ships and vessels, must be held to mean their entire internal cubical capacity, or contents of the ship or vessel expressed in tons of one hundred cubical feet each, as estimated and ascertained by those rules of admeasurement and of computation.

Power to tax, with certain exceptions, resides with the States, independent of the Federal government, and the power, when confined within its true limits, may be exercised without restraint from any Federal authority. They cannot, however, without the consent of Congress, lay any duty of tonnage, nor can they levy any imposts or duties on imports or exports, except what may be absolutely necessary for executing their inspection laws, as without the consent of Congress they are unconditionally prohibited from exercising any such power. Outside of those prohibitions the power of the States to tax extends to all objects within the

* See Act of July 18th, 1866, § 28; 14 Stat. at Large, 185.

† 12 Stat. at Large, 492, 70; *Ib.*, 444.

sovereign power of the States, except the means and instruments of the Federal government. But ships and vessels owned by individuals and belonging to the commercial marine are regarded as the private property of their owners, and not as the instruments or means of the Federal government, and as such, when viewed as property, they are plainly within the taxing power of the States, as they are not withdrawn from the operation of that power by any express or implied prohibition contained in the Federal Constitution.† . . .

Taxes levied by a State upon ships and vessels owned by the citizens of the State as property based on a valuation of the same as property, are not within the prohibition of the Constitution, but it is equally clear and undeniable that taxes levied by a State upon ships and vessels as instruments of commerce and navigation are within that clause of the instrument which prohibits the States from levying any duty of tonnage, without the consent of Congress; and it makes no difference whether the ships or vessels taxed belong to the citizens of the State which levies the tax or the citizens of another State, as the prohibition is general, withdrawing altogether from the States the power to lay any duty of tonnage under any circumstances, without the consent of Congress.

Annual taxes upon property in ships and vessels are continually laid, and their validity was never doubted or called in question, but if the States, without the consent of Congress, tax ships or vessels as instruments of commerce, by a tonnage duty, or indirectly by imposing the tax upon the master or crew, they assume a jurisdiction which they do not possess, as every such act falls directly within the prohibition of the Constitution. . . .

Tonnage duties are as much taxes as duties on imports or exports, and the prohibition of the Constitution extends as fully to such duties if levied by the States as to duties on imports or exports, and for reasons quite as strong as those which induced the framers of the Constitution to withdraw imports and exports from State taxation. Measures, however, scarcely distinguishable from each other may flow from distinct grants of power, as, for example, Congress does not possess the power to regulate the purely internal commerce of the States, but Congress may enroll

† *Alexander v. Railroad*, 3 Strobbart, 598.

and license ships and vessels to sail from one port to another in the same State; and it is clear that such ships and vessels are deemed ships and vessels of the United States, and that as such they are entitled to the privileges of ships and vessels employed in the coasting trade. . . .

Steamboats, as well as sailing ships and vessels, are required to be enrolled and licensed for the coasting trade, and the record shows that all the steamboats taxed in this case had conformed to all the regulations of Congress in that regard, that they were duly enrolled and licensed for the coasting trade and were engaged in the transportation of passengers and freight within the limits of the State, upon waters navigable from the sea by vessels of ten or more tons burden.

Tonnage duties, to a greater or less extent, have been imposed by Congress ever since the Federal government was organized under the Constitution to the present time. They have usually been exacted when the ship or vessel entered the port, and have been collected in a manner not substantially different from that prescribed in the act of the State legislature under consideration. Undisputed authority exists in Congress to impose such duties, and it is not pretended that any consent has ever been given by Congress to the State to exercise any such power.

If the tax levied is a duty of tonnage, it is conceded that it is illegal, and it is difficult to see how the concession could be avoided, as the prohibition is express, but the attempt is made to show that the legislature, in enacting the law imposing the tax, merely referred to the registered tonnage of the steamboats "as a way or mode to determine and ascertain the tax to be assessed on the steamboats, and to furnish a rule or rate to govern the assessors in the performance of their duties." . . .

By the terms of the law the taxation prescribed is "at the rate of one dollar per ton of the registered tonnage thereof," and the ninetieth section of the act provides that the tax collector must, each year, demand of the person in charge of the steamboat whether the taxes have been paid, and if the person in charge fails to produce a receipt therefor by a tax collector, authorized to collect such taxes, the collector having the list must at once proceed to assess the same, and if the tax is not paid on demand he must seize such steamboat, &c., and after twenty days' notice,

as therein prescribed, shall sell the same, or so much thereof as will pay the taxes and expenses for keeping and costs.*

Legislative enactments, where the language is unambiguous, cannot be changed by construction, nor can the language be divested of its plain and obvious meaning. Taxes levied under an enactment which directs that a tax shall be imposed on steamboats at the rate of one dollar per ton of the registered tonnage thereof, and that the same shall be assessed and collected at the port where such steamboats are registered, cannot, in the judgment of this court, be held to be a tax on the steamboat as property. On the contrary, the tax is just what the language imports, a duty of tonnage, which is made even plainer when it comes to be considered that the steamboats are not to be taxed at all unless they are "plying in the navigable waters of the State," showing to a demonstration that it is as instruments of commerce and not as property that they are required to contribute to the revenues of the State.

Such provision is much more clearly within the prohibition in question than the one involved in a recent case decided by this court, in which it was held that a statute of a State enacting that the wardens of a port were entitled to demand and receive, in addition to other fees, the sum of five dollars for every vessel arriving at the port, whether called on to perform any service or not, was both a regulation of commerce and a duty of tonnage, and that as such it was unconstitutional and void.†

Speaking of the same prohibition, the Chief Justice said in that case that those words in their most obvious and general sense describe a duty proportioned to the tonnage of the vessel—a certain rate on each ton—which is exactly what is directed by the provision in the tax act before the court, but he added that it seems plain, if the Constitution be taken in that restricted sense, it would not fully accomplish the intent of the framers, as the prohibition upon the States against levying duties on imports or exports would be ineffectual if it did not also extend to duties on the ships which serve as the vehicles of conveyance, which was doubtless intended by the prohibition of any duty of tonnage. "It was not only a pro rata tax which was prohibited, but

* Sess. Acts, 1866, pp. 7, 31.

† *Steamship Co. v. Port Wardens*, 6 Wallace, 34.

any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty."

Assume the rule to be as there laid down, and all must agree that "the levy of the tax in question is expressly prohibited, as the schedule shows that it is exactly proportioned to the registered tonnage of the steamboats plying in the navigable waters of the State." . . .

Taxes in aid of the inspection laws of a State, under special circumstances, have been upheld as necessary to promote the interests of commerce and the security of navigation.*

Laws of that character are upheld as contemplating benefits and advantages to commerce and navigation, and as altogether distinct from imposts and duties on imports and exports and duties of tonnage. Usage, it is said, has sanctioned such laws where Congress has not legislated, but it is clear that such laws bear no relation to the act in question, as the act under consideration is emphatically an act to raise revenue to replenish the treasury of the State and for no other purpose, and does not contemplate any beneficial service for the steamboats or other vessels subjected to taxation.

Beyond question the act is an act to raise revenue without any corresponding or equivalent benefit or advantage to the vessels taxed or to the ship-owners, and consequently it cannot be upheld by virtue of the rules applied in the construction of laws regulating pilot dues and port charges.†

Attempt was made in the case of *Alexander v. Railroad* to show that the form of levying the tax was simply a mode of assessing the vessels as property, but the argument did not prevail, nor can it in this case, as the amount of the tax is measured by the tonnage of the steamboats and not by their value as property.

Reference is made to the case of the *Towboat Company v. Bordelon*,‡ as asserting the opposite rule, but the court is of a different opinion, as the tax in that case was levied, not upon the boat, but upon the capital of the company owning the boat, and

* *Cooley v. Port Wardens*, 12 Howard, 314.

† *State v. Charleston*, 4 Rich., S. C., 286; *Benedict v. Vanderbilt*, 1 Robt. N. Y., 200.

‡ 7 Louisiana An., 195.

the court in delivering their opinion say the capital of the company is property, and the Constitution of the State requires an equal and uniform tax to be imposed upon it with the other property of the State for the support of government.

For these reasons the court is of opinion that the State law levying the taxes in this case is unconstitutional and void, that the judgment of the State Court is erroneous and that it must be reversed, and having come to that conclusion, the court does not find it necessary to determine the other question.

Judgment reversed with costs, and the cause remanded for further proceedings in conformity to the opinion of the court.

II. IN THE SECOND CASE. . . . Power to tax for the support of the State governments exists in the States independently of the Federal government, and it may well be admitted that where there is no cession of jurisdiction for the purposes specified in the Constitution, and no restraining compact between the States and the Federal government, the power in the States to tax reaches all the property within the State which is not properly denominated the instruments or means of the Federal government.*

Concede all that and still the court is of opinion that the tax in this case is a duty of tonnage, and that the law imposing it is plainly unconstitutional and void. Taxes, as the law provides, must be assessed by the assessor in each county on and from the following subjects and at the following rates, to wit: "On all steamboats, &c., plying in the navigable waters of the State, at the rate of one dollar per ton of the registered tonnage thereof," which must be assessed and collected at the port where such steamboats are registered, &c.† Copied as the provision is from the enactment of the previous year, it is obvious that it must receive the same construction, and as the tax is one dollar per ton, it is too plain for argument that the amount of the tax depends upon the carrying capacity of the steamboat and not upon her value as property, as the experience of every one shows that a small steamer, new and well built, may be of much greater value than a large one, badly built or in need of extensive repairs.

* Nathan v. Louisiana, 8 Howard, 82; McCulloch v. Maryland, 4 Wheaton, 429; Society for Savings v. Oelte, 6 Wallace, 604; Brown v. Maryland, 12 Wheaton, 448; Weston v. Charleston, 2 Peters, 467.

† Revised Code, 169.

Separate lists are made for the county and school taxes, but the two combined amount exactly to one dollar per ton, as in the levy for the State tax, and the court is of the opinion that the case falls within the same rule as the case just decided.

THE STATES MAY NOT LEVY A TAX WHICH INFRINGES UPON THE POWER OF CONGRESS OVER COMMERCE.

BROWN v. MARYLAND.

12 Wheaton, 419; 7 Curtis, 262. 1827.

Mr. Chief Justice MARSHALL delivered the opinion of the court.

This is a writ of error to a judgment rendered in the Court of Appeals of Maryland, affirming a judgment of the City Court of Baltimore, on an indictment found in that court against the plaintiffs in error, for violating an act of the Legislature of Maryland. The indictment was founded on the 2d section of that act, which is in these words: "And be it enacted that all importers of foreign articles or commodities, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey, and other distilled spirituous liquors, etc., and other persons selling the same by wholesale, bale or package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out a license, as by the original act is directed, for which they shall pay fifty dollars; and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement." The indictment charges the plaintiffs in error with having imported and sold one package of foreign dry goods without having license to do so. A judgment was rendered against them, on demurrer, for the penalty which the act prescribes for the offense; and that judgment is now before this court.

The cause depends entirely on the question whether the legislature of a State can constitutionally require the importer of foreign articles to take out a license from the State, before he shall be permitted to sell a bale or package so imported.

It has been truly said that the presumption is in favor of every

legislative act, and that the whole burden of proof lies on him who denies its constitutionality. The plaintiffs in error take the burden upon themselves, and insist that the act under consideration is repugnant to two provisions in the constitution of the United States.

1. To that which declares that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

2. To that which declares that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

1. The first inquiry is into the extent of the prohibition upon States "to lay any imposts or duties on imports or exports." The counsel for the State of Maryland would confine this prohibition to laws imposing duties on the act of importation or exportation. The counsel for the plaintiffs in error give them a much wider scope.

In performing the delicate and important duty of construing clauses in the Constitution of our country, which involve conflicting powers of the government of the Union, and of the respective States, it is proper to take a view of the literal meaning of the words to be expounded, of their connection with other words, and of the general objects to be accomplished by the prohibitory clause, or by the grant of power.

What, then, is the meaning of the words, "imposts or duties on imports or exports?"

An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before or on entering the port, does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are "imports?" The lexicons inform us they are "things imported." If we appeal to usage for the meaning of the word, we shall receive the same

answer. They are the articles themselves which are brought into the country. "A duty on imports," then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. The succeeding words of the sentence which limit the prohibition, show the extent in which it was understood. The limitation is "except what may be absolutely necessary for executing its inspection laws." Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the States to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition.

If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made, we know no reason why this general rule should not be as applicable to the Constitution as to other instruments. If it be applicable, then this exception in favor of duties for the support of inspection laws, goes far in proving that the framers of the Constitution classed taxes of a similar character with those imposed for the purposes of inspection, with duties on imports and exports, and supposed them to be prohibited.

If we quit this narrow view of the object, and, passing from the literal interpretation of the words, look to the objects of the prohibition, we find no reason for withdrawing the act under consideration from its operation.

From the vast inequality between the different States of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several States exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by the statesmen of that day, the

general power of taxation, indispensably necessary as it was, and jealous as the States were of any encroachment on it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed. Why are they restrained from imposing these duties? Plainly, because, in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of Congress. . . .

The counsel for the State of Maryland insist, with great reason, that if the words of the prohibition be taken in their utmost latitude, they will abridge the power of taxation, which all admit to be essential to the States, to an extent which has never yet been suspected, and will deprive them of resources which are necessary to supply revenue, and which they have heretofore been admitted to possess. These words must, therefore, be construed with some limitation; and, if this be admitted, they insist, that entering the country is the point of time when the prohibition ceases, and the power of the State to tax commences.

It may be conceded that the words of the prohibition ought not to be pressed to their utmost extent; that in our complex system, the object of the powers conferred on the government of the Union, and the nature of the often conflicting powers which remain in the States, must always be taken into view, and may aid in expounding the words of any particular clause. But, while we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object the Constitution is intended to secure; that there must be a point of time when the prohibition ceases, and the power of the State to tax commences; we cannot admit that this point of time is the instant that the articles enter the country. It is, we think, obvious, that this construction would defeat the prohibition.

The constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. . . .

The counsel for the plaintiffs in error contend that the importer purchases, by payment of the duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country; and certainly the argument is supported by strong

reason, as well as by the practice of nations, including our own. The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it. The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only which are intended for sale or consumption in the country. Thus, sea stores, goods imported and re-exported in the same vessel, goods landed and carried overland for the purpose of being re-exported from some other port, goods forced in by stress of weather, and landed, but not for sale, are exempted from the payment of duties. The whole course of legislation on the subject shows that, in the opinion of the legislature, the right to sell is connected with the payment of duties. . . .

This indictment is against the importer, for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them or otherwise mixes them with the general property of the State, by breaking up his packages, and travelling with them as an itinerant peddler. In the first case, the tax intercepts the import, as an import in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the State. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the State. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer.

So if he sells by auction. Auctioneers are persons licensed by the State, and if the importer chooses to employ them, he can as little object to paying for this service, as for any other for which he may apply to an officer of the State. The right of sale may very well be annexed to importation, without annexing to

it, also, the privilege of using the officers licensed by the State to make sales in a peculiar way.

The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States. If the possessor stores it himself out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine, it is because he stores it there, in his own opinion, more advantageously than elsewhere. We are not sure that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is undoubtedly an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed the laws of the United States expressly sanction the health laws of a State.

The principle, then, for which the plaintiffs in error contend, that the importer acquires a right, not only to bring the articles into the country, but to mix them with the common mass of property, does not interfere with the necessary power of taxation which is acknowledged to reside in the States, to that dangerous extent which the counsel for the defendants in error seem to apprehend. It carries the prohibition in the Constitution no further than to prevent the States from doing that which it was the great object of the Constitution to prevent.

But if it should be proved that a duty on the article itself would be repugnant to the Constitution, it is still argued that this is not a tax upon the article, but on the person. The State, it is said, may tax occupations, and this is nothing more.

. It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it. So a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the

article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the Constitution.

In support of the argument that the prohibition ceases the instant the goods are brought into the country, a comparison has been drawn between the opposite words, export and import. As to export, it is said, means only to carry goods out of the country, so to import means only to bring them into it. But suppose we extend this comparison to the two prohibitions. The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any State. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the States. Now suppose the United States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the Constitution would expose it, by saying that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations? Or suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage, were the government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or thing imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country?

We think then, that the act under which the plaintiffs in error were indicted is repugnant to that article of the Constitution which declares, that "no State shall lay any impost or duties on imports or exports."

2. Is it also repugnant to that clause in the Constitution which empowers "Congress to regulate commerce with foreign nations, and among the several States, and with the Indian tribes?"

The oppressed and degraded state of commerce previous to the

adoption of the Constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the Federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States. To construe the power so as to impair its efficacy, would tend to defeat an object in the attainment of which the American public took, and justly took that strong interest which arose from a full conviction of its necessity.

What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several States?

This question was considered in the case of *Gibbons v. Ogden*, 9 Wheat. 1, in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. The power is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior.

We deem it unnecessary now to reason in support of these propositions. Their truth is proved by facts continually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned. . . .

What would be the language of a foreign government, which should be informed that its merchants, after importing according to law, were forbidden to sell the merchandise imported? What answer would the United States give to the complaints and just reproaches to which such an extraordinary circumstance would expose them? No apology could be received, or

even offered. Such a state of things would break up commerce. It will not meet this argument to say that this state of things will never be produced; that the good sense of the States is a sufficient security against it. The Constitution has not confided this subject to that good sense. It is placed elsewhere. The question is, Where does the power reside? not, How far will it be probably abused? The power claimed by the State is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence.

We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.

If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling the article, in his character of importer, must be in opposition to the act of Congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is, to prescribe the regular means for accomplishing that introduction and incorporation.

The distinction between a tax on the thing imported and on the person of the importer can have no influence on this part of the subject. It is too obvious for controversy that they interfere equally with the power to regulate commerce.

It has been contended that this construction of the power to regulate commerce, as was contended in construing the prohibition to lay duties on imports, would abridge the acknowledged power of a State to tax its own citizens, or their property within its territory.

We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed that the powers remaining with the States may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that

which is supreme. This great and universal truth is inseparable from the nature of things, and the Constitution has applied it to the often interfering powers of the General and State governments, as a vital principle of perpetual operation. It results, necessarily, from this principle that the taxing power of the States must have some limits. It cannot reach and restrain the action of the national government within its proper sphere. It cannot reach the administration of justice in the courts of the Union, or the collection of the taxes of the United States, or restrain the operation of any law which Congress may constitutionally pass. It cannot interfere with any regulation of commerce. If the States may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the State from one port to another, for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a State from taxing any article passing through it, from one State to another, for the purpose of traffic? or from taxing the transportation of articles passing from the State itself to another State for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce and affect materially the purpose for which that power was given.

We think there is error in the judgment of the Court of Appeals of the State of Maryland. . . .

The judgment is to be reversed. . . .

THOMPSON, J., dissented.

CHAPTER V.

MONEY.

THE POWER TO BORROW MONEY INCLUDES THE POWER TO ORGANIZE A BANK.*

McCULLOCH v. MARYLAND.

4 Wheaton 316. (Previously given.)

NO STATE SHALL EMIT BILLS OF CREDIT.

CRAIG ET AL. v. THE STATE OF MISSOURI.

4 Peters, 410. (1830.)

MARSHALL, C. J., delivered the opinion of the court, Justices THOMPSON, JOHNSON, and McLEAN dissenting.

This is a writ of error to a judgment rendered in the court of last resort, in the State of Missouri, affirming a judgment obtained by the State in one of its inferior courts, against Hiram Craig and others, on a promissory note. . . .

The declaration is on a promissory note, dated on the first day of August, 1822, promising to pay to the State of Missouri, on the 1st day of November, 1822, at the loan office in Chariton, the sum of \$199.99, and the two per cent. per annum, the interest accruing on the certificates borrowed from the first of October, 1821. This note is obviously given for certificates loaned under the act, "for the establishment of loan offices." That act directs that loans on personal security shall be made of sums less than \$200. This note is for \$199.99. The act directs that the certificates issued by the State shall carry two per cent. interest from the date, which interest shall be calculated in the amount of the loan. The note promises to repay the sum with the two per cent. interest accruing on the certificates borrowed from the 1st day of October, 1821. It cannot be doubted that the dec-

* See, Sec. 139, Vol. 2, Cyclopedia of Law Series.

laration is on a note given in pursuance of the act which has been mentioned.

Neither can it be doubted that the plea of non-assumpsit allowed the defendants to draw into question at the trial the validity of the consideration on which the note was given. Everything which disaffirms the contract, everything which shows it to be void, may be given in evidence on the general issue in an action of assumpsit. The defendants, therefore, were at liberty to question the validity of the consideration which was the foundation of the contract, and the constitutionality of the law in which it originated. . . .

This brings us to the great question in the cause: Is the act of the legislature of Missouri repugnant to the constitution of the United States?

The counsel for the plaintiffs in error maintain that it is repugnant to the constitution, because its object is the emission of bills of credit, contrary to the express prohibition contained in the tenth section of the first article.

The act under the authority of which the certificates loaned to the plaintiffs in error were issued, was passed on the 26th of June, 1821, and is entitled "an act for the establishment of loan-offices." The provisions that are material to the present inquiry are comprehended in the third, thirteenth, fifteenth, sixteenth, twenty-third, and twenty-fourth sections of the act, which are in these words:

Section the third enacts, "that the auditor of public accounts and treasurer, under the direction of the governor, shall, and they are hereby required to issue certificates, signed by the said auditor and treasurer, to the amount of \$200,000, of denominations not exceeding ten dollars, nor less than fifty cents (to bear such devices as they may deem the most safe), in the following form, to wit: 'This certificate shall be receivable at the treasury, or any of the loan-offices of the State of Missouri, in the discharge of taxes or debts due to the State, for the sum of \$—, with interest for the same, at the rate of two per centum per annum from this date, the — day of —, 182—.' "

The thirteenth section declares, "that the certificates of the said loan-offices shall be receivable at the treasury of the State, and by all tax-gatherers and other public officers, in payment of taxes or other moneys now due to the State, or to any county

or town therein, and the said certificates shall also be received by all officers, civil and military, in the State, in the discharge of salaries and fees of office."

The fifteenth section provides, "that the commissioners of the said loan-offices shall have power to make loans of the said certificates, to citizens of this State, residing within their respective districts only, and in each district a proportion shall be loaned to the citizens of each county therein, according to the number thereof," etc.

Section sixteenth. "That the said commissioners of each of the said offices are further authorized to make loans on personal securities, by them deemed good and sufficient, for sums less than two hundred dollars; which securities shall be jointly and severally bound for the payment of the amount so loaned, with interest thereon," etc.

Section twenty-third. "That the general assembly shall, as soon as may be, cause the salt springs and lands attached thereto, given by congress to this State, to be leased out; and it shall always be the fundamental condition in such leases, that the lessee or lessees shall receive the certificates hereby required to be issued, in payment for salt, at a price not exceeding that which may be prescribed by law; and all the proceeds of the said salt springs, the interest accruing to the State, and all estates purchased by officers of the said several offices, under the provisions of this act, and all the debts now due or hereafter to be due to this State, are hereby pledged and constituted a fund for the redemption of the certificates hereby required to be issued, and the faith of the State is hereby also pledged for the same purpose."

Section twenty-fourth. "That it shall be the duty of the said auditor and treasurer to withdraw annually from circulation, one-tenth part of the certificates which are hereby required to be issued," etc.

The clause in the constitution which this act is supposed to violate is in these words: "No State shall . . . emit bills of credit."

What is a bill of credit? What did the constitution mean to forbid?

In its enlarged, and perhaps its literal sense, the term "bill of credit" may comprehend any instrument by which a State

engages to pay money at a future day; thus including a certificate given for money borrowed. But the language of the constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limits the interpretation of the terms. The word "emit" is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated "bills of credit." To "emit bills of credit," conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood.

At a very early period of our colonial history, the attempt to supply the want of the precious metals by a paper medium was made to a considerable extent; and the bills emitted for this purpose have been frequently denominated bills of credit. During the war of our Revolution, we were driven to this expedient; and necessity compelled us to use it to a most fearful extent. The term has acquired an appropriate meaning; and "bills of credit" signify a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society. Such a medium has been always liable to considerable fluctuation. Its value is continually changing; and these changes, often great and sudden, expose individuals to immense loss, are the sources of ruinous speculations, and destroy all confidence between man and man. To cut up this mischief by the roots, a mischief which was felt through the United States, and which deeply affected the interest and prosperity of all, the people declared in their constitution, that no State should emit bills of credit. If the prohibition means anything, if the words are not empty sounds, it must comprehend the emission of any paper medium, by a State government, for the purpose of common circulation. . . .

Had they been termed "bills of credit," instead of "certificates," nothing would have been wanting to bring them within the prohibitory words of the constitution.

And can this make any real difference? Is the proposition to be maintained, that the constitution meant to prohibit names and

not things? That a very important act, big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing? We cannot think so. We think the certificates emitted under the authority of this act are as entirely bills of credit as if they had been so denominated in the act itself.

The certificates for which this note was given, being in truth "bills of credit" in the sense of the constitution, we are brought to the inquiry: Is the note valid of which they form the consideration?

It has been long settled, that a promise made in consideration of an act which is forbidden by law is void. It will not be questioned, that an act forbidden by the constitution of the United States, which is the supreme law, is against law. Now the constitution forbids a State to "emit bills of credit." The loan of these certificates is the very act which is forbidden. It is not the making of them while they lie in the loan offices; but the issuing of them, the putting them into circulation, which is the act of emission, the act that is forbidden by the constitution. The consideration of this note is the emission of bills of credit by the State. The very act which constitutes the consideration, is the act of emitting bills of credit, in the mode prescribed by the law of Missouri; which act is prohibited by the constitution of the United States. . . .

A majority of the court feels constrained to say that the consideration on which the note in this case was given, is against the highest law of the land, and that the note itself is utterly void. In rendering judgment for the plaintiff, the court for the State of Missouri decided in favor of the validity of a law which is repugnant to the constitution of the United States.

In the argument, we have been reminded by one side of the dignity of a sovereign State, of the humiliation of her submitting herself to this tribunal, of the dangers which may result from inflicting a wound on that dignity; by the other, of the still superior dignity of the people of the United States, who have spoken their will in terms which we cannot misunderstand.

To these admonitions, we can only answer: that if the exer-

cise of that jurisdiction which has been imposed upon us by the constitution and laws of the United States, shall be calculated to bring on those dangers which have been indicated; or if it shall be indispensable to the preservation of the Union, and consequently of the independence and liberty of these States; these are considerations which address themselves to those departments which may with perfect propriety be influenced by them. This department can listen only to the mandates of law, and can tread only that path which is marked out by duty.

The judgment of the Supreme Court of the State of Missouri for the first judicial district is reversed, and the cause remanded, with directions to enter judgment for the defendants.

[Justices JOHNSON, THOMPSON, and McLEAN delivered dissenting opinions.]

In *Briscoe et al. v. Bank of Kentucky*, 11 Pet. 257, (1837), a note given to the Bank of the Commonwealth of Kentucky, in renewal of a like note, the consideration for which was the bills of the bank, which were claimed to be bills of credit and hence an illegal consideration, was held to be collectible on the ground that the bills issued by the bank were not bills of credit within the meaning of the Constitution. McLEAN, J., in delivering the opinion of the court, said:

"Having arrived at this point, the next inquiry in the case is whether the notes of the Bank of the Commonwealth were bills of credit within the meaning of the constitution.

The first section of the charter provides, that the bank shall be established in the name and behalf of the commonwealth of Kentucky, under the direction of a president and twelve directors to be chosen by joint ballot of both houses of the general assembly, etc. . . . [The second section provides for the incorporation of these persons with the usual powers.] In the third section it is declared, that the stock of the bank shall be exclusively the property of the commonwealth of Kentucky, and that no individual shall own any part of it. The fourth section authorizes the president and directors to issue notes, etc.; and in the fifth section it is declared, that the capital stock shall be \$2,000,000, to be paid as follows: "All moneys hereafter paid into the treasury for the purchase of the vacant land of the commonwealth; all moneys paid into the treasury for the purchase of land warrants; all moneys received for the sale of vacant lands west of the Tennessee River, and so much of the capital stock owned by the State in the Bank of Kentucky;" and as the treasurer of the State received these moneys from time to time, he was required to pay the same into the bank. . . . Certain limitations were imposed on loans to individuals, and the accommodations of the bank

were to be apportioned among the different counties of the State. The president was required to make a report to each session of the legislature. The notes were to be made payable in gold and silver, and were receivable in payment of taxes and other debts due to the State. All mortgages executed to the bank, gave to it a priority. By a supplementary act it was provided that the president and directors might issue \$3,000,000. In 1821, an act was passed authorizing the treasurer of the State to receive the dividends of the bank.

The notes issued by the bank were in the usual form of bank notes, in which the Bank of the Commonwealth promised to pay to the bearer on demand the sum specified on the face of the note. . . .

Were these notes issued by the State?

Upon their face, they do not purport to be issued by the State, but by the president and directors of the bank. They promise to pay to bearer on demand the sums stated. Were they issued on the faith of the State? The notes contain no pledge of the faith of the State in any form. They purport to have been issued on the credit of the funds of the bank, and must have been so received in the community.

But these funds, it is said, belonged to the State; and the promise to pay on the face of the notes was made by the president and directors as agents of the State. They do not assume to act as agents, and there is no law which authorizes them to bind the State. As in, perhaps, all bank charters, they had the power to issue a certain amount of notes; but they determined the time and circumstances which should regulate these issues.

When a State emits bills of credit, the amount to be issued is fixed by law, as also for the fund out of which they are to be paid, if any fund be pledged for their redemption; and they are issued on the credit of the State, which in some form appears upon the face of the notes, or by the signature of the person who issues them.

As to the funds of the Bank of the Commonwealth, they were, in part only, derived from the State. The capital, it is true, was to be paid by the State; but in making loans, the bank was required to take good securities; and these constituted a fund, to which the holders of the notes could look for payment, and which could be made legally responsible.

In this respect the notes of this bank were essentially different from any class of bills of credit which are believed to have been issued.

The notes were not payable in gold and silver on demand, but there was a fund, and, in all probability, a sufficient fund, to redeem them. This fund was in possession of the bank, and under the control of the president and directors. But whether the fund was adequate to the redemption of the notes issued or not, is immaterial to the present inquiry. It is enough that the fund existed, independent of the State, and was sufficient to give some degree of credit to the paper of the bank.

The question is not whether the Bank of the Commonwealth had a large capital or a small one, or whether its notes were in good credit or bad, but whether they were issued by the State, and on the faith and credit of the State. The notes were received in payment of taxes, and in discharge of all debts to the State; and this, aided by the fund arising from notes discounted, with prudent management, under favorable circumstances, might have sustained, and it is believed did sustain to a considerable extent, the credit of the bank. The notes of this bank which are still in circulation are equal in value, it is said, to specie.

But there is another quality which distinguished these notes from bills of credit. Every holder of them could not only look to the funds of the bank for payment, but he had in his power the means of enforcing it.

The bank could be sued; and the records of this court show that while its paper was depreciated, a suit was prosecuted to judgment against it by a depositor, and who obtained from the bank, it is admitted, the full amount of his judgment in specie. . . .

The funds of the bank and its property, of every description, are held responsible for the payment of its debts, and may be reached by legal or equitable process. In this respect, it can claim no exemption under the prerogatives of the States. And, if in the course of its operations its notes have depreciated like the notes of other banks under the pressure of circumstances, still it must stand or fall by its charter. In this its powers are defined; and its rights, and the rights of those who give credit to it, are guaranteed. And even an abuse of its powers, through which its credit has been impaired and the community injured, cannot be considered in this case.

We are of the opinion that the act incorporating the Bank of the Commonwealth was a constitutional exercise of power by the State of Kentucky, and, consequently, that the notes issued by the bank are not bills of credit within the meaning of the federal constitution. The judgment of the court of appeals is, therefore, affirmed, with interest and costs. . . .

[Mr. Justice THOMPSON delivered a concurring opinion, and Mr. Justice STORY a dissenting one.]

PAPER MONEY.*

POWER OF CONGRESS TO ISSUE PAPER MONEY AND MAKE SAME
LEGAL TENDER.

HEPBURN v. GRISWOLD.

8 Wallace, 603. (1870.)

Error to the Court of Appeals of Kentucky, the case being this:

On the 20th of June, 1860, a certain Mrs. Hepburn made a promissory note, by which she promised to pay to Henry Griswold on the 20th of February, 1862, eleven thousand two hundred and fifty "dollars."

At the time when the note was made, as also at the time when it fell due, there was, confessedly, no lawful money of the United States, or money which could lawfully be tendered in payment of private debts, but gold and silver coin.

Five days after the day when the note by its terms fell due, that is to say, on the 25th of February, 1862, in an exigent crisis of the nation, in which the government was engaged in putting down an armed rebellion of vast magnitude, Congress passed an act authorizing the issue of \$150,000,000 of its own notes, and enacted in regard to them, by one clause in the first section of the act, as follows:

"And such notes, herein authorized, shall be receivable in payment of all taxes, internal duties, excises, debts, and demands of every kind due to the United States, except duties on imports, and of all claims and demands against the United States of every kind whatsoever, except for interest upon bonds and notes, which shall be paid in coin; and shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid."

The note given by Mrs. Hepburn not being paid at maturity, interest accrued on it. And in March, 1864, suit having been brought on the note in the Louisville Chancery Court, she tendered in United States notes issued under the act mentioned \$12,720, the amount of principal of the note with the interest

* See, Sec. 140, Vol. 2, Cyclopedia of Law.

accrued to the date of tender, and some costs in satisfaction of the plaintiff's claim. The tender was refused. The notes were then tendered and paid into court; and the chancellor, "resolving all doubts in favor of Congress," declared the tender good and adjudged the debt, interest and costs to be satisfied accordingly.

The case was then taken by Griswold to the Court of Errors of Kentucky, which reversed the chancellor's judgment, and remanded the case with instructions to enter a contrary judgment.

From the judgment of the Court of Errors of Kentucky, the case was brought by Mrs. Hepburn here. . . .

The CHIEF JUSTICE delivered the opinion of the court.

The question presented for our determination by the record in this case, is whether or not the payee or assignee of a note, made before the 25th of February, 1862, is obliged by law to accept in payment United States notes, equal in nominal amount to the sum due according to its terms, when tendered by the maker or other party bound to pay it? And this requires, in the first place, a construction of that clause of the first section of the act of Congress passed on that day, which declares the United States notes, the issue of which was authorized by the statute, to be a legal tender in payment of debts. The clause has already received much consideration here, and this court has held that, upon a sound construction, neither taxes imposed by State legislation,* nor demands upon contracts which stipulate in terms for the delivery of coin or bullion,† are included by legislative intention under the description of debts public and private. We are now to determine whether this description embraces debts contracted before as well as after the date of the act.

It is an established rule for the construction of statutes, that the terms employed by the legislature are not to receive an interpretation which conflicts with acknowledged principles of justice and equity, if another sense, consonant with those principles, can be given to them. But this rule cannot prevail where the intent is clear. Except in the scarcely supposable case where a statute sets at naught the plainest precepts of morality and social obliga-

* Lane County v. Oregon, 7 Wallace, 71.

† Bronson v. Rodes, 7 Id., 229; Butler v. Horwitz, Ib., 253.

tion, courts must give effect to the clearly ascertained legislative intent, if not repugnant to the fundamental law ordained in the Constitution.

Applying the rule just stated to the act under consideration, there appears to be strong reason for construing the word debts as having reference only to debts contracted subsequent to the enactment of the law. For no one will question that the United States notes, which the act makes a legal tender in payment, are essentially unlike in nature, and, being irredeemable in coin, are necessarily unlike in value, to the lawful money intended by parties to contracts for the payment of money made before its passage. The lawful money then in use and made a legal tender in payment, consisted of gold and silver coin. The currency in use under the act, and declared by its terms to be lawful money and a legal tender, consists of notes or promises to pay impressed upon paper, prepared in convenient form for circulation, and protected against counterfeiting by suitable devices and penalties. The former possess intrinsic value, determined by the weight and fineness of the metal; the latter have no intrinsic value, but a purchasing value, determined by the quantity in circulation, by general consent to its currency in payments, and by opinion as to the probability of redemption in coin. Both derive, in different degrees, a certain additional value from their adaptation to circulation by the form and impress given to them under national authority, and from the acts making them respectively a legal tender.

Contracts for the payment of money, made before the act of 1862, had reference to coined money, and could not be discharged, unless by consent, otherwise than by tender of the sum due in coin. Every such contract, therefore, was, in legal import, a contract for the payment of coin.

There is a well-known law of currency, that notes or promises to pay, unless made conveniently and promptly convertible into coin at the will of the holder, can never, except under unusual and abnormal conditions, be at par in circulation with coin. It is an equally well known law, that depreciation of notes must increase with the increase of the quantity put in circulation and the diminution of confidence in the ability or disposition to redeem. Their appreciation follows the reversal of these conditions. No act making them a legal tender can change materially

the operation of these laws. Their force has been strikingly exemplified in the history of the United States notes. Beginning with a very slight depreciation when first issued, in March, 1862, they sank in July, 1864, to the rate of two dollars and eighty-five cents for a dollar in gold, and then rose until recently a dollar and twenty cents in paper became equal to a gold dollar.

Admitting, then, that prior contracts are within the intention of the act, and assuming that the act is warranted by the Constitution, it follows that the holder of a promissory note, made before the act, for a thousand dollars, payable, as we have just seen, according to the law and according to the intent of the parties, in coin, was required, when depreciation reached its lowest point, to accept in payment a thousand note dollars, although with the thousand coin dollars, due under the contract, he could have purchased on that day two thousand eight hundred and fifty such dollars. Every payment, since the passage of the act, of a note of earlier date, has presented similar, though less striking features.

Now, it certainly needs no argument to prove that an act, compelling acceptance in satisfaction of any other than stipulated payment, alters arbitrarily the terms of the contract, and impairs its obligation, and that the extent of impairment is in the proportion of the inequality of the payment accepted under the constraint of the law to the payment due under the contract. Nor does it need argument to prove that the personal operation of such an act is contrary to justice and equity. It follows that no construction which attributes such practical operation to an act of Congress is to be favored, or indeed to be admitted, if any other can be reconciled with the manifest intent of the legislature.

What, then, is that manifest intent? Are we at liberty, upon a fair and reasonable construction of the act, to say that Congress meant that the word "debts" used in the act should not include debts contracted prior to its passage? . . .

These considerations seem to us conclusive. We do not think ourselves at liberty, therefore, to say that Congress did not intend to make the notes authorized by it a legal tender in payment of debts contracted before the passage of the act.

We are thus brought to the question, whether Congress has

power to make notes issued under its authority a legal tender in payment of debts, which, when contracted, were payable by law in gold and silver coin.

The delicacy and importance of this question has not been overstated in the argument. This court always approaches the consideration of questions of this nature reluctantly; and its constant rule of decision has been, and is, that acts of Congress must be regarded as constitutional, unless clearly shown to be otherwise. . . .

The case before us is one of private right. The plaintiff in the court below sought to recover of the defendants a certain sum expressed on the face of a promissory note. The defendants insisted on the right, under the act of February 25th, 1862, to acquit themselves of their obligation by tendering in payment a sum nominally equal in United States notes. But the note had been executed before the passage of the act, and the plaintiff insisted on his right under the Constitution to be paid the amount due in gold and silver. And it has not been, and cannot be, denied that the plaintiff was entitled to judgment according to his claim, unless bound by a constitutional law to accept the notes as coin.

Thus two questions were directly presented: Were the defendants relieved by the act from the obligation assumed in the contract? Could the plaintiff be compelled, by a judgment of the court, to receive in payment a currency of different nature and value from that which was in the contemplation of the parties when the contract was made?

The Court of Appeals resolved both questions in the negative, and the defendants, in the original suit, seek the reversal of that judgment by writ of error.

It becomes our duty, therefore, to determine whether the act of February 25, 1862, so far as it makes United States notes a legal tender in payment of debts contracted prior to its passage, is constitutional and valid or otherwise. Under a deep sense of our obligation to perform this duty to the best of our ability and understanding, we shall proceed to dispose of the case presented by the record.

We have already said, and it is generally, if not universally, conceded, that the government of the United States is one of

limited powers, and that no department possesses any authority not granted by the Constitution.

It is not necessary, however, in order to prove the existence of a particular authority, to show a particular and express grant. The design of the Constitution was to establish a government competent to the direction and administration of the affairs of a great nation, and, at the same time, to mark, by sufficiently definite lines, the sphere of its operations. To this end it was needful only to make express grants of general powers, coupled with a further grant of such incidental and auxiliary powers as might be required for the exercise of the powers expressly granted.

. . .

The rule for determining whether a legislative enactment can be supported as an exercise of an implied power was stated by Chief Justice Marshall, speaking for the whole court, in the case of *McCulloch v. The State of Maryland*, and the statement then made has ever since been accepted as a correct exposition of the Constitution. His words were these: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." And in another part of the same opinion the practical application of this rule was thus illustrated: "Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would be the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and tread on legislative ground."

It must be taken then as finally settled, so far as judicial decisions can settle anything, that the words "all laws necessary and proper for carrying into execution" powers expressly granted or vested, have, in the Constitution, a sense equivalent to that of the words, laws, not absolutely necessary indeed, but appropriate,

plainly adapted to constitutional and legitimate ends; laws not prohibited, but consistent with the letter and spirit of the Constitution; laws really calculated to effect objects intrusted to the government.

The question before us, then, resolves itself into this: "Is the clause which makes United States notes a legal tender for debts contracted prior to its enactment, a law of the description stated in the rule?"

Let us, then, first inquire whether it is an appropriate and plainly adapted means for carrying on war? The affirmative argument may be thus stated: Congress has power to declare and provide for carrying on war; Congress has also power to emit bills of credit, or circulating notes receivable for government dues, and payable, so far at least as parties are willing to receive them, in discharge of government obligations; it will facilitate the use of such notes in disbursements to make them a legal tender in payment of existing debts; therefore Congress may make such notes a legal tender.

It is difficult to say to what express power the authority to make notes a legal tender in payment of pre-existing debts may not be upheld as incidental, upon the principles of this argument. Is there any power which does not involve the use of money? And is there any doubt that Congress may issue and use bills of credit as money in the execution of any power? The power to establish post-offices and post-roads, for example, involves the collection and disbursement of a great revenue. Is not the power to make notes a legal tender as clearly incidental to this power as to the war power?

The answer to this question does not appear to us doubtful. The argument, therefore, seems to prove too much. It carries the doctrine of implied powers very far beyond any extent hitherto given to it. It asserts that whatever in any degree promotes an end within the scope of a general power, whether, in the correct sense of the word, appropriate or not, may be done in the exercise of an implied power.

Can this proposition be maintained?

It is said that this is not a question for the court deciding a cause, but for Congress exercising the power. But the decisive answer to this is that the admission of a legislative power to determine finally what powers have the described relation as means

to the execution of other powers plainly granted, and, then, to exercise absolutely and without liability to question, in cases involving private rights, the powers thus determined to have that relation, would completely change the nature of American government. It would convert the government, which the people ordained as a government of limited powers, into a government of unlimited powers. It would confuse the boundaries which separate the executive and judicial from the legislative authority. It would obliterate every criterion which this court, speaking through the venerated Chief Justice in the case already cited, established for the determination of the question whether legislative acts are constitutional or unconstitutional.

Undoubtedly among means appropriate, plainly adapted, really calculated, the legislature has unrestricted choice. But there can be no implied power to use means not within the description. [The Court then stated the facts in providing a National currency.]

We recur, then, to the question under consideration. No one questions the general constitutionality, and not very many, perhaps, the general expediency of the legislation by which a note currency has been authorized in recent years. The doubt is as to the power to declare a particular class of these notes to be a legal tender in payment of pre-existing debts.

The only ground upon which this power is asserted is, not that the issue of notes was an appropriate and plainly adapted means for carrying on the war, for that is admitted; but that the making of them a legal tender to the extent mentioned was such a means.

Now, we have seen that of all the notes issued those not declared a legal tender at all constituted a very large proportion, and that they circulated freely and without discount.

It may be said that their equality in circulation and credit was due to the provision made by law for the redemption of this paper in legal tender notes. But this provision, if at all useful in this respect, was of trifling importance compared with that which made them receivable for government dues. All modern history testifies that, in time of war especially, when taxes are augmented, large loans negotiated, and heavy disbursements made, notes issued by the authority of the government, and made receivable for dues of the government, always obtain at first a

ready circulation; and even when not redeemable in coin, on demand, are as little and usually less subject to depreciation than any other description of notes, for the redemption of which no better provision is made. And the history of the legislation under consideration is, that it was upon this quality of receivability, and not upon the quality of legal tender, that reliance for circulation was originally placed; for the receivability clause appears to have been in the original draft of the bill, while the legal tender clause seems to have been introduced at a later stage of its progress. . . .

We are unable to persuade ourselves that an expedient of this sort is an appropriate and plainly adapted means for the execution of the power to declare and carry on war. If it adds nothing to the utility of the notes, it cannot be upheld as a means to the end in furtherance of which the notes are issued. Nor can it, in our judgment, be upheld as such, if, while facilitating in some degree the circulation of the notes, it debases and injures the currency in its proper use to a much greater degree. And those considerations seem to us equally applicable to the powers to regulate commerce and to borrow money. Both powers necessarily involve the use of money by the people and by the government, but neither, as we think, carries with it as an appropriate and plainly adapted means to its exercise, the power of making circulating notes a legal tender in payment of pre-existing debts.

But there is another view, which seems to us decisive, to whatever express power the supposed implied power in question may be referred. In the rule stated by Chief Justice Marshall, the words appropriate, plainly adapted, really calculated, are qualified by the limitation that the means must be not prohibited, but consistent with the letter and spirit of the Constitution. Nothing so prohibited or inconsistent can be regarded as appropriate, or plainly adapted, or really calculated means to any end.

Let us inquire, then, first, whether making bills of credit a legal tender, to the extent indicated, is consistent with the spirit of the Constitution. Among the great cardinal principles of that instrument, no one is more conspicuous or more venerable than the establishment of justice. And what was intended by the establishment of justice in the minds of the people who ordained

it is, happily, not a matter of disputation. It is not left to inference or conjecture, especially in its relations to contracts.

When the Constitution was undergoing discussion in the Convention, the Congress of the Confederation was engaged in the consideration of the ordinance for the government of the territory northwest of the Ohio,—the only territory subject at that time to its regulation and control. By this ordinance certain fundamental articles of compact were established between the original States and the people and States of the territory, for the purpose, to use its own language, “of extending the fundamental principles of civil and religious liberty, whereon these republics” (the States united under the Confederation), “their laws and constitutions are erected.” Among these fundamental principles was this: “And in the just preservation of rights and property it is understood and declared that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with or affect private contracts or engagements bona fide and without fraud previously formed.”

The same principle found more condensed expression in that most valuable provision of the Constitution of the United States, ever recognized as an efficient safeguard against injustice, that “no State shall pass any law impairing the obligation of contracts.”

It is true that this prohibition is not applied in terms to the government of the United States. Congress has express power to enact bankrupt laws, and we do not say that a law made in the execution of any other express power, which, incidentally only, impairs the obligation of a contract, can be held to be unconstitutional for that reason.

But we think it clear that those who framed and those who adopted the Constitution, intended that the spirit of this prohibition should pervade the entire body of legislation, and that the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency. In other words, we cannot doubt that a law not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution.

Another provision, found in the fifth amendment, must be considered in this connection. We refer to that which ordains that

private property shall not be taken for public use without compensation. This provision is kindred in spirit to that which forbids legislation impairing the obligation of contracts; but, unlike that, it is addressed directly and solely to the National government. It does not, in terms, prohibit legislation which appropriates the private property of one class of citizens to the use of another class; but if such property cannot be taken for the benefit of all, without compensation, it is difficult to understand how it can be so taken for the benefit of a part without violating the spirit of the prohibition.

But there is another provision in the same amendment, which, in our judgment, cannot have its full and intended effect unless construed as a direct prohibition of the legislation which we have been considering. It is that which declares that "no person shall be deprived of life, liberty, or property, without due process of law." . . .

We confess ourselves unable to perceive any solid distinction between such an act and an act compelling all citizens to accept, in satisfaction of all contracts for money, half or three-quarters or any other proportion less than the whole of the value actually due, according to their terms. It is difficult to conceive what act would take private property without process of law if such an act would not.

We are obliged, therefore, to hold that the defendant in error was not bound to receive from the plaintiffs the currency tendered to him in payment of their note, made before the passage of the act of February 25, 1862. It follows that the judgment of the Court of Appeals of Kentucky must be affirmed.

[Justices MILLER, SWAYNE and DAVIS dissented.]

LEGAL TENDER CASES.

12 *Wallace*, 457. (*Previously given*.)

JUILLARD v. GREENMAN.

110 *U. S.*, 421. (1884.)

Mr. Justice GRAY delivered the opinion of the court.

The amount which the plaintiff seeks to recover, and which if the tender pleaded is insufficient in law, he is entitled to re-

cover, is \$5,100. There can, therefore, be no doubt of the jurisdiction of this court to revise the judgment of the Circuit Court.

The notes of the United States, tendered in payment of the defendant's debt to the plaintiff, were originally issued under the acts of Congress of February 25th, 1862, ch. 33, July 11th, 1862, ch. 142, and March 3d, 1863, ch. 73, passed during the war of the rebellion, and enacting that these notes should "be lawful money and a legal tender in payment of all debts, public and private, within the United States," except for duties on imports and interest on the public debt. 12 Stat., 345, 532, 709.

The provisions of the earlier acts of Congress, so far as it is necessary, for the understanding of the recent statutes, to quote them, are re-enacted in the following provisions of the Revised Statutes:—

"Sec. 3579. When any United States notes are returned to the treasury, they may be reissued, from time to time, as the exigencies of the public interest may require.

"Sec. 3580. When any United States notes returned to the Treasury are so mutilated or otherwise injured as to be unfit for use, the Secretary of the Treasury is authorized to replace the same with others of the same character and amounts.

"Sec. 3581. Mutilated United States notes, when replaced according to law, and all other notes which by law are required to be taken up and not reissued, when taken up shall be destroyed in such manner and under such regulations as the Secretary of the Treasury may prescribe.

"Sec. 3582. The authority given to the Secretary of the Treasury to make any reduction of the currency, by retiring and cancelling United States notes, is suspended."

"Sec. 3588. United States notes shall be lawful money and a legal tender in payment of all debts, public and private, within the United States, except for duties on imports and interest on the public debt."

The act of January 14th, 1875, ch. 15, "to provide for the resumption of specie payments," enacted that on and after January 1st, 1879, "the Secretary of the Treasury shall redeem in coin the United States legal tender notes then outstanding, on their presentation for redemption at the office of the Assistant Treasurer of the United States in the City of New York, in sums of not less than fifty dollars," and authorized him to use for that purpose any surplus revenues in the Treasury and the proceeds of the sales of certain bonds of the United States. 18 Stat., 296.

The act of May 31st, 1878, ch. 146, under which the notes in question were reissued, is entitled "An act to forbid the further retirement of United States legal tender notes," and enacts as follows:—

"From and after the passage of this act it shall not be lawful for the Secretary of the Treasury or other officer under him to cancel or retire any more of the United States legal tender notes. And when any of said notes may be redeemed or be received into the Treasury under any law from any source whatever and shall belong to the United States, they shall not be retired, cancelled, or destroyed, but they shall be reissued and paid out again and kept in circulation: Provided, That nothing herein shall prohibit the cancellation and destruction of mutilated notes and the issue of other notes of like denomination in their stead, as now provided by law. All acts and parts of acts in conflict herewith are hereby repealed." 20 Stat., 87.

The manifest intention of this act is that the notes which it directs, after having been redeemed, to be reissued and kept in circulation, shall retain their original quality of being a legal tender.

The single question, therefore, to be considered, and upon the answer to which the judgment to be rendered between these parties depends, is whether notes of the United States, issued in time of war, under acts of Congress declaring them to be a legal tender in payment of private debts, and afterwards in time of peace redeemed and paid in gold coin at the Treasury, and then reissued under the act of 1878, can, under the Constitution of the United States, be a legal tender in payment of such debts.

Upon full consideration of the case, the court is unanimously of opinion that it cannot be distinguished in principle from the cases heretofore determined, reported under the names of the Legal Tender Cases, 12 Wall., 457; *Dooley v. Smith*, 13 Wall., 604; *Railroad Company v. Johnson*, 15 Wall., 195; and *Maryland v. Railroad Company*, 22 Wall., 105; and all the judges, except Mr. Justice Field, who adheres to the views expressed in his dissenting opinions in those cases, are of opinion that they were rightly decided.

The elaborate printed briefs submitted by counsel in this case, and the opinions delivered in the Legal Tender Cases, and in the earlier case of *Hepburn v. Griswold*, 8 Wall., 603, which those cases overruled, forcibly present the arguments on either side of

the question of the power of Congress to make the notes of the United States a legal tender in payment of private debts. Without undertaking to deal with all those arguments, the court has thought it fit that the grounds of its judgment in the case at bar should be fully stated.

No question of the scope and extent of the implied powers of Congress under the Constitution can be satisfactorily discussed without repeating much of the reasoning of Chief Justice Marshall in the great judgment in *McCulloch v. Maryland*, 4 Wheat., 316, by which the power of Congress to incorporate a bank was demonstrated and affirmed, notwithstanding the Constitution does not enumerate, among the powers granted, that of establishing a bank or creating a corporation.

The people of the United States by the Constitution established a national government, with sovereign powers, legislative, executive, and judicial. "The government of the Union," said Chief Justice Marshall, "though limited in its powers, is supreme within its sphere of action;" "and its laws, when made in pursuance of the Constitution, form the supreme laws of the land." "Among the enumerated powers of government, we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government." 4 Wheat., 405, 406, 407.

A constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, and intended to endure for ages and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract. The Constitution of the United States, by apt words of designation or general description, marks the outlines of the powers granted to the national legislature; but it does not undertake, with the precision and detail of a code of laws, to enumerate the subdivisions of those powers, or to specify all the means by which they may be carried into execution. Chief Justice Marshall, after dwelling upon this view, as required by the very nature of the Constitution, by the language in which it is framed, by the limitations upon the general powers of Congress introduced in the ninth section of the first article,

and by the omission to use any restrictive term which might prevent its receiving a fair and just interpretation, added these emphatic words: "In considering this question, then, we must never forget that it is a constitution we are expounding." 4 Wheat., 107. See also page 415.

The breadth and comprehensiveness of the words of the Constitution are nowhere more strikingly exhibited than in regard to the powers over the subjects of revenue, finance, and currency, of which there is no other express grant than may be found in these few brief clauses:—

"The Congress shall have power

"To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

"To borrow money on the credit of the United States;

"To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

"To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures."

The section which contains the grant of these and other principal legislative powers concludes by declaring that the Congress shall have power

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

By the settled construction and the only reasonable interpretation of this clause, the words "necessary and proper" are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution; but they include all appropriate means which are conducive or adapted to the end to be accomplished, and which in the judgment of Congress will most advantageously effect it.

That clause of the Constitution which declares that "the Congress shall have the power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States," either embodies a grant of power to pay the debts of the United States, or presupposes and assumes that power as inherent in the United

States as a sovereign government. But, in whichever aspect it be considered, neither this nor any other clause of the Constitution makes any mention of priority or preference of the United States as a creditor over other creditors of an individual debtor. Yet this court, in the early case of *United States v. Fisher*, 2 Cranch, 358, held that, under the power to pay the debts of the United States, Congress had the power to enact that debts due to the United States should have that priority of payment out of the estate of an insolvent debtor, which the law of England gave to debts due the Crown. . . .

The constitutional authority of Congress to provide a currency for the whole country is now firmly established. In *Veazie Bank v. Fenno*, 8 Wall., 533, 548, Chief Justice Chase, in delivering the opinion of the court, said: "It cannot be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government, and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit." Congress, having undertaken to supply a national currency, consisting of coin, of treasury notes of the United States, and of the bills of national banks, is authorized to impose on all State banks, or national banks, or private bankers, paying out the notes of individuals or of State banks, a tax of ten per cent. upon the amount of such notes so paid out. *Veazie Bank v. Fenno*, above cited; *National Bank v. United States*, 101 U. S., 1. The reason for this conclusion was stated by Chief Justice Chase, and repeated by the present Chief Justice, in these words: "Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile." 8 Wall., 549; 101 U. S., 6.

By the Constitution of the United States, the several States are prohibited from coining money, emitting bills of credit, or mak-

ing anything but gold and silver coin a tender in payment of debts. But no intention can be inferred from this to deny to Congress either of these powers. Most of the powers granted to Congress are described in the eighth section of the first article; the limitations intended to be set to its powers, so as to exclude certain things which might otherwise be taken to be included in the general grant, are defined in the ninth section; the tenth section is addressed to the States only. This section prohibits the States from doing some things which the United States are expressly prohibited from doing, as well as from doing some things which the United States are expressly authorized to do, and from doing some things which are neither expressly granted nor expressly denied to the United States. Congress and the States equally are expressly prohibited from passing any bill of attainder or ex post facto law, or granting any title of nobility. The States are forbidden, while the President and Senate are expressly authorized, to make treaties. The States are forbidden, but Congress is expressly authorized, to coin money. The States are prohibited from emitting bills of credit; but Congress, which is neither expressly authorized nor expressly forbidden to do so, has, as we have already seen, been held to have the power of emitting bills of credit, and of making every provision for their circulation as currency, short of giving them the quality of legal tender for private debts—even by those who have denied its authority to give them this quality.

It appears to us to follow, as a logical and necessary consequence, that Congress has the power to issue the obligations of the United States in such form, and to impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments. The power, as incident to the power of borrowing money and issuing bills or notes of the government for money borrowed, of impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the Constitution of the United States. The governments of Europe, acting through the monarch or the legislature, according to the distribution of powers under their respective constitutions, had and have as sovereign a power of issuing paper money as of

stamping coin. This power has been distinctly recognized in an important modern case, ably argued and fully considered, in which the Emperor of Austria, as King of Hungary, obtained from the English Court of Chancery an injunction against the issue in England, without his license, of notes purporting to be public paper money of Hungary. *Austria v. Day*, 2 Giff., 628, and 3 D. F. & J., 217. The power of issuing bills of credit, and making them, at the discretion of the legislature, a tender in payment of private debts, had long been exercised in this country by the several Colonies and States; and during the Revolutionary War the States, upon the recommendation of the Congress of the Confederation, had made the bills issued by Congress a legal tender. See *Craig v. Missouri*, 4 Pet., 435, 453; *Briscoe v. Bank of Kentucky*, 11 Pet., 257, 313, 334-336; *Legal Tender Cases*, 12 Wall., 557, 558, 622; *Phillips on American Paper Currency*, *passim*. The exercise of this power not being prohibited to Congress by the Constitution, it is included in the power expressly granted to borrow money on the credit of the United States.

. . .
The power of making the notes of the United States a legal tender in payment of private debts, being included in the power to borrow money and to provide a national currency, is not defeated or restricted by the fact that its exercise may affect the value of private contracts. If, upon a just and fair interpretation of the whole Constitution, a particular power or authority appears to be vested in Congress, it is no constitutional objection to its existence, or to its exercise, that the property or the contracts of individuals may be incidentally affected. The decisions of this court, already cited, afford several examples of this.

. . .

Judgment affirmed.

CHAPTER VI.

POWER OF CONGRESS OVER COMMERCE.*

THE POWER OF CONGRESS DOES NOT EXTEND TO THE DOMESTIC COMMERCE OF THE STATES, BUT EXTENDS TO PREVENT STATE LEGISLATION FROM CONFLICTING WITH LAWS OF CONGRESS IN REGARD TO INTER-STATE COMMERCE, AND TO PREVENT THE STATES FROM GRANTING AN EXCLUSIVE PRIVILEGE TO CARRY ON COMMERCE IN ANY PARTICULAR WAY, TENDING TO LIMIT THE POWER OF CONGRESS.

GIBBONS v. OGDEN.

9 Wheaton, 1. (1824.)

[The case arose on an appeal from a New York State court, where Chancellor Kent, had upheld by injunction the act of the state legislature granting to Robert R. Livingstone and Robert Fulton the exclusive right to navigate all the waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years which had not yet expired. This exclusive right had been transferred by the original grantees to John R. Livingstone, and by him to the complainant, Ogden, who sought to restrain Gibbons, the owner of several steamboats, from operating in the waters within the jurisdiction of the State of New York.]

MARSHALL, C. J., delivered the opinion of the court, and, after stating the case, proceeded as follows:—

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains are repugnant to the constitution and laws of the United States.

They are said to be repugnant,—

1. To that clause in the constitution which authorizes congress to regulate commerce.
2. To that which authorizes congress to promote the progress of science and useful arts.

* See Secs. 141 to 150, No. 2, *Cyclopedia of Law*.

The State of New York maintains the constitutionality of these laws; and their legislature, their council of revision, and their judges, have repeatedly concurred in this opinion. It is supported by great names,—by names which have all the titles to consideration that virtue, intelligence, and office can bestow. No tribunal can approach the decision of this question without feeling a just and real respect for that opinion which is sustained by such authority; but it is the province of this court, while it respects, not to bow to it implicitly; and the judges must exercise, in the examination of the subject, that understanding which Providence has bestowed upon them, with that independence which the people of the United States expect from this department of the government.

As preliminary to the very able discussions of the constitution which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these States, anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, congress is authorized “to make all laws which shall be necessary and proper” for the purpose. . . .

The words are: “Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.” The subject to be regulated is commerce; and our constitution being, as was aptly said at the

bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more,—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word “commerce” to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense and the attempt to restrict it comes too late.

If the opinion that “commerce,” as the word is used in the constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself. It is a rule of construction acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not granted,—

that which the words of the grant could not comprehend. If, then, there are in the constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.

The 9th section of the 1st article declares that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another." This clause cannot be understood as applicable to those laws only which are passed for the purpose of revenue, because it is expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another, in regulating commerce, relates to navigation. But the subsequent part of the sentence is still more explicit. It is, "nor shall vessels bound to or from one State, be obliged to enter, clear, or pay duties in another." These words have a direct reference to navigation.

The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

To what commerce does this power extend? The constitution informs us, to commerce "with foreign nations, and among the several States, and with the Indian tribes." It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend. It has been truly said that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied is to commerce "among the several States." The word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the States cannot stop at

the external boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient and is certainly unnecessary. . . .

But, in regulating commerce with foreign nations, the power of congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of congress may be exercised within a State. . . .

We are now arrived at the inquiry, what is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its

abuse. They are the restraints upon which the people must often rely solely, in all representative governments.

The power of congress, then, comprehends navigation within the limits of every State in the Union, so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies.

But it has been urged with great earnestness that, although the power of congress to regulate commerce with foreign nations, and among the several States, be co-extensive with the subject itself, and have no other limits than are prescribed in the constitution, yet the States may severally exercise the same power within their respective jurisdictions. In support of this argument, it is said that they possessed it as an inseparable attribute of sovereignty before the formation of the constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the tenth amendment; that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description.

The appellant, conceding these postulates, except the last, contends that full power to regulate a particular subject implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it.

Both parties have appealed to the constitution, to legislative acts, and judicial decisions; and have drawn arguments from all these sources to support and illustrate the propositions they respectively maintain. . . .

In discussing the question whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to congress, or is retained until congress shall exercise the power. We may dismiss that inquiry because it has been exercised, and the regulations which congress deemed it proper to make are now in full operation. The sole question is, can a State

regulate commerce with foreign nations and among the States while congress is regulating it?

The counsel for the respondent answer this question in the affirmative, and rely very much on the restrictions in the 10th section as supporting their opinion. . . .

These restrictions, then, are on the taxing power, not on that to regulate commerce; and presuppose the existence of that which they restrain, not of that which they do not purport to restrain.

But the inspection laws are said to be regulations of commerce, and are certainly recognized in the constitution as being passed in the exercise of a power remaining with the States.

That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws is to improve the quality of articles produced by the labor of a country, to fit them for exportation, or it may be for domestic use. They act upon the subject before it becomes an article of foreign commerce or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to a general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass. . . .

In our complex system, presenting the rare and difficult scheme of one general government whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous State governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers would often be of the same description, and might sometimes interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other. . . .

Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the

States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of congress passed in pursuance of the constitution, the court will enter upon the inquiry whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several States," or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of congress, and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous. . . .

In pursuing this inquiry at the bar, it has been said that the constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The constitution found it an existing right, and gave to congress the power to regulate it. In the exercise of this power, congress has passed "An act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." The counsel for the respondent contend that this act does not give the right to sail from port to port, but confines itself to regulating a pre-existing right, so far only as to confer certain privileges on enrolled and licensed vessels in its exercise.

It will at once occur that when a legislature attaches certain privileges and exemptions to the exercise of a right over which its control is absolute, the law must imply a power to exercise the right. The privileges are gone if the right itself be annihilated. It would be contrary to all reason and to the course of human affairs to say that a State is unable to strip a vessel of the particular privileges attendant on the exercise of a right, and yet may annul the right itself; that the State of New York cannot prevent an enrolled and licensed vessel proceeding from Elizabethtown, in New Jersey, to New York, from enjoying, in her course and on her entrance into port, all the privileges conferred by the act of congress, but can shut her up in her own

port, and prohibit altogether her entering the waters and ports of another State. To the court it seems very clear that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies unequivocally an authority to licensed vessels to carry on the coasting trade.

But we will proceed briefly to notice those sections which bear more directly on the subject.

The first section declares that vessels enrolled by virtue of a previous law, and certain other vessels, enrolled as described in that act, and having a license in force, as is by the act required, "and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade."

This section seems to the court to contain a positive enactment that the vessels it describes shall be entitled to the privileges of ships or vessels employed in the coasting trade. These privileges cannot be separated from the trade, and cannot be enjoyed unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached, and in the exercise of which its whole value consists. To construe these words otherwise than as entitling the ships or vessels described to carry on the coasting trade would be, we think, to disregard the apparent intent of the act.

The 4th section directs the proper officer to grant to a vessel qualified to receive it, "a license for carrying on the coasting trade;" and prescribes its form. After reciting the compliance of the applicant with the previous requisites of the law, the operative words of the instrument are, "license is hereby granted for the said steamboat *Bellona* to be employed in carrying on the coasting trade for one year from the date hereof, and no longer."

These are not the words of the officer; they are the words of the legislature; and convey as explicitly the authority the act intended to give, and operate as effectually, as if they had been inserted in any other part of the act than in the license itself.

The word "license" means permission, or authority; and a license to do any particular thing is a permission or authority to do that thing; and if granted by a person having power to

grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer to do what is within the terms of the license. Would the validity or effect of such an instrument be questioned by the respondent if executed by persons claiming regularly under the laws of New York?

The license must be understood to be what it purports to be,—a legislative authority to the steamboat *Bellona* “to be employed in carrying on the coasting trade for one year from this date.”

It has been denied that these words authorize a voyage from New Jersey to New York. It is true that no ports are specified; but it is equally true that the words used are perfectly intelligible, and do confer such authority as unquestionably as if the ports had been mentioned. The coasting trade is a term well understood. The law has defined it; and all know its meaning perfectly. The act describes, with great minuteness, the various operations of a vessel engaged in it; and it cannot, we think, be doubted that a voyage from New Jersey to New York is one of those operations. . . .

If the power reside in congress, as a portion of the general grant to regulate commerce, then acts applying that power to vessels generally must be construed as comprehending all vessels. If none appear to be excluded by the language of the act, none can be excluded by construction. Vessels have always been employed, to a greater or less extent, in the transportation of passengers, and have never been supposed to be, on that account, withdrawn from the control or protection of congress. Packets which ply along the coast, as well as those which make voyages between Europe and America, consider the transportation of passengers as an important part of their business. Yet it has never been suspected that the general laws of navigation did not apply to them. . . .

If, then, it were even true, that *The Bellona* and *The Stoudinger* were employed exclusively in the conveyance of passengers between New York and New Jersey, it would not follow that this occupation did not constitute a part of the coasting trade of the United States, and was not protected by the license annexed to the answer. But we cannot perceive how the occupation of these vessels can be drawn into question in the case before the court. The laws of New York, which grant the exclu-

sive privilege set up by the respondent, take no notice of the employment of vessels, and relate only to the principle by which they are propelled. Those laws do not inquire whether vessels are engaged in transporting men or merchandise, but whether they are moved by steam or wind. If by the former, the waters of New York are closed against them, though their cargoes be dutiable goods, which the laws of the United States permit them to enter and deliver in New York. If by the latter, those waters are free to them, though they should carry passengers only. In conformity with the law, is the bill of the plaintiff in the state court. The bill does not complain that *The Bellona* and *The Stoudinger* carry passengers, but that they are moved by steam. This is the injury of which he complains, and is the sole injury against the continuance of which he asks relief. The bill does not even allege, specially, that those vessels were employed in the transportation of passengers, but says, generally, that they were employed "in the transportation of passengers, or otherwise." The answer avers only that they are employed in the coasting trade, and insists on the right to carry on any trade authorized by the license. No testimony is taken, and the writ of injunction and decree restrain these licensed vessels, not from carrying passengers, but from being moved through the waters of New York by steam, for any purpose whatever.

The questions, then, whether the conveyance of passengers be a part of the coasting trade, and whether a vessel can be protected in that occupation by a coasting license, are not, and cannot be, raised in this case. The real and sole question seems to be, whether a steam machine, in actual use, deprives a vessel of the privileges conferred by a license.

In considering this question, the first idea which presents itself, is that the laws of congress for the regulation of commerce, do not look to the principle of which vessels are moved. That subject is left entirely to individual discretion; and in that vast and complex system of legislative enactment concerning it, which embraces everything which the legislature thought it necessary to notice, there is not, we believe, one word respecting the peculiar principle by which vessels are propelled through the water, except what may be found in a single act,* granting

* 2 Stats. at Large, 694.

a particular privilege to steamboats. With this exception, every act, either prescribing duties, or granting privileges, applies to every vessel, whether navigated by the instrumentality of wind or fire, of sails or machinery. The whole weight of proof, then, is thrown upon him who would introduce a distinction to which the words of the law give no countenance.

If a real difference could be admitted to exist between vessels carrying passengers and others, it has already been observed that there is no fact in this case which can bring up that question. And, if the occupation of steamboats be a matter of such general notoriety that the court may be presumed to know it, although not specially informed by the record, then we deny that the transportation of passengers is their exclusive occupation. It is a matter of general history, that, in our western waters, their principal employment is the transportation of merchandise; and all know that in the waters of the Atlantic they are frequently so employed.

But all inquiry into this subject seems to the court to be put completely at rest, by the act already mentioned, entitled, "An act for the enrolling and licensing of steamboats."

This act authorizes a steamboat employed, or intended to be employed, only in a river or bay of the United States, owned wholly or in part by an alien, resident within the United States, to be enrolled and licensed as if the same belonged to a citizen of the United States.

✓ This act demonstrates the opinion of congress, that steamboats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters, and entering ports which are free to such vessels, than if they were wafted on their voyage by the winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other, for every commercial purpose authorized by the laws of the Union; and the act of a State inhibiting the use of either to any vessel having a license under the act of congress, comes, we think, in direct collision with that act.

As this decides the cause, it is unnecessary to enter in an examination of that part of the constitution which empowers congress to promote the progress of science and the useful arts.

[Mr. Justice JOHNSON delivered a concurring opinion.]

PENSACOLA TELEGRAPH COMPANY v. WESTERN
UNION TELEGRAPH COMPANY.*96 United States 1. 1877.*

[Plaintiff sought in the Circuit Court of the United States for Florida to enjoin the defendant from constructing a line of telegraph through the State to Pensacola, claiming an exclusive privilege to maintain such a line by virtue of State legislation. The bill being dismissed, plaintiff appealed to this Court.]

Mr. Chief Justice WARRE delivered the opinion of the court.

Congress has power "to regulate commerce with foreign nations and among the several States" (Const. art. 1, sect. 8, par. 3); and "to establish post-offices and post-roads" (id., par. 7). The Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land. Art. 6, par. 2. A law of Congress made in pursuance of the Constitution suspends or overrides all State statutes with which it is in conflict.

Since the case of *Gibbons v. Ogden*, 9 Wheat. 1, it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government.

The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the

duty, of Congress to see to it that the intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation.

The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of inter-communication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates show that more than eighty per cent of all the messages sent by telegraph related to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movement of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information.

It is not only important to the people, but to the government. By means of it the heads of the departments in Washington are kept in close communication with all the various agencies at home and abroad, and can know at almost any hour, by inquiry, what is transpiring anywhere that affects the interest they have in charge. Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and inter-communication comes within the controlling power of Congress, certainly as against hostile State legislation. In fact, from the beginning, it seems to have been assumed that Congress might aid in developing the system; for the first telegraph line of any considerable extent ever erected was built between Washington and Baltimore only a little more than thirty years ago, with money appropriated by Congress for that purpose (5 Stat. 618); and large donations of land and money have since been made to aid in the construction of other lines (12 id. 489, 772; 13 id. 365; 14 id. 292). It is not necessary now to inquire whether Congress may assume the telegraph as part of the postal service, and exclude all others from its use. The present case is satisfied, if we find that Congress has power, by appropriate legislation, to prevent the States from placing obstructions in the way of its usefulness.

The government of the United States, within the scope of its

powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by State lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all.

The State of Florida has attempted to confer upon a single corporation the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory. This embraces the two westernmost counties of the State, and extends from Alabama to the Gulf. No telegraph line can cross the State from east to west, or from north to south, within these counties, except it passes over this territory. Within it is situated an important seaport, at which business centers, and with which those engaged in commercial pursuits have occasion more or less to communicate. The United States have there also the necessary machinery of the national government. They have a navy-yard, forts, custom-houses, courts, post-offices, and the appropriate officers for the enforcement of the laws. The legislation of Florida, if sustained, excludes all commercial intercourse by telegraph between the citizens of the other States and those residing upon this territory, except by the employment of this corporation. The United States cannot communicate with their own officers by telegraph except in the same way. The State, therefore, clearly has attempted to regulate commercial intercourse between its citizens and those of other States, and to control the transmission of all telegraphic correspondence within its own jurisdiction.

It is unnecessary to decide how far this might have been done if Congress had not acted upon the same subject, for it has acted. The statute of July 24, 1866, in effect, amounts to a prohibition of all State monopolies in this particular. It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as State interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the

national government for this national privilege. To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the States, and is appropriate legislation to carry into execution the powers of Congress over the postal service. It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide, that, whenever the consent of the owner is obtained, no State legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.

It is insisted, however, that the statute extends only to such military and post-roads as are upon the public domain; but this, we think, is not so. The language is, "Through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States." There is nothing to indicate an intention of limiting the effect of the words employed, and they are, therefore, to be given their natural and ordinary signification. Read in this way, the grant evidently extends to the public domain, the military and post-roads, and the navigable waters of the United States. These are all within the dominion of the national government to the extent of the national powers, and are, therefore, subject to legitimate congressional regulation. No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted.

The State law in question, so far as it confers exclusive rights upon the Pensacola Company, is certainly in conflict with this legislation of Congress. To that extent it is, therefore, inoperative as against a corporation of another State entitled to the privileges of the act of Congress. Such being the case, the charter of the Pensacola Company does not exclude the Western

Union Company from the occupancy of the right of way of the Pensacola and Louisville Railroad Company under the arrangement made for that purpose.

We are aware that, in *Paul v. Virginia*, 8 Wall. 168, this court decided that a State might exclude a corporation of another State from its jurisdiction, and that corporations are not within the clause of the Constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Art. 4, sect. 2. That was not, however, the case of a corporation engaged in interstate commerce; and enough was said by the court to show, that, if it had been, very different questions would have been presented. The language of the opinion is (p. 182): "It is undoubtedly true, as stated by counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. . . . This state of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on: it is general, and includes alike commerce by individuals, partnerships, associations, and corporations. . . . The defect of the argument lies in the character of their (insurance companies) business. Issuing a policy of insurance is not a transaction of commerce. . . . Such contracts (policies of insurance) are not inter-state transactions, though the parties are domiciled in different States."

The questions thus suggested need not be considered now, because no prohibitory legislation is relied upon, except that which, as has already been seen, is inoperative. Upon principles of comity, the corporations of one State are permitted to do business in another, unless it conflicts with the law, or unjustly interferes with the rights of the citizens of the State into which they come. Under such circumstances, no citizen of a State can enjoin a foreign corporation from pursuing its business. Until the State acts in its sovereign capacity, individual citizens cannot complain. The State must determine for itself when the public good requires that its implied assent to the admission shall be withdrawn. Here, so far from withdrawing its assent, the State, by its legislation of 1874, in effect, invited foreign

telegraph corporations to come in. Whether that legislation, in the absence of congressional action, would have been sufficient to authorize a foreign corporation to construct and operate a line within the two counties named, we need not decide; but we are clearly of the opinion, that, with such action and a right of way secured by private arrangement with the owner of the land, this defendant corporation cannot be excluded by the present complainant.

Decree affirmed.

ORIGINAL PACKAGE CASES.

LEISY v. HARDIN.

135 U. S. 100. *Decided 1890.*

[Error to the Supreme Court of Iowa. The plaintiffs, who were brewers doing business at Peoria, Illinois, had shipped beer in sealed packages to Keokuk, Iowa, where it was offered for sale in the original packages. A certain quantity of the beer was seized by Hardin, the city marshal of Keokuk, under color of authority of the statutes of Iowa which forbade the manufacture or sale of intoxicating liquors, or keeping them with intent to sell, except for medicinal, chemical, pharmaceutical and sacramental purposes as allowed in the act. The plaintiffs brought replevin against Hardin to recover the beer seized, and the local court gave judgment for the plaintiffs on the ground that the State enactment was invalid. This judgment was reversed by the Supreme Court of Iowa.]

Mr. Chief Justice FULLER, after stating the case, delivered the opinion of the court.

The power vested in Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution. It is co-extensive with the subject on which it acts and cannot be stopped at the external boundary of a State, but must enter its interior and must be capable of authorizing the

disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered. *Gibbons v. Ogden*, 9 Wheat. 1; *Brown v. Maryland*, 12 Wheat. 419. . . .

It was stated in the 32d number of the *Federalist* that the States might exercise concurrent and independent power in all cases but three: First, where the power was lodged exclusively in the federal constitution; second, where it was given to the United States and prohibited to the States; third, where, from the nature and subjects of the power, it must be necessarily exercised by the national government exclusively. But it is easy to see that Congress may assert an authority under one of the granted powers, which would exclude the exercise by the States upon the same subject of a different but similar power, between which and that possessed by the general government no inherent repugnancy existed.

Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the States may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled. *County of Mobile v. Kimball*, 102 U. S. 691; *Brown v. Houston*, 114 U. S. 622, 631; *Wabash, St. Louis, etc., Railway v. Illinois*, 118 U. S. 557; *Robbins v. Shelby Taxing District*, 120 U. S. 489, 493.

That ardent spirits, distilled liquors, ale and beer, are subjects of exchange, barter and traffic, like any other commodity, in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of courts, is not denied. Being thus articles of commerce, can a State, in the absence of legislation on the part of

Congress, prohibit their importation from abroad or from a sister State? or when imported prohibit their sale by the importer? If the importation cannot be prohibited without the consent of Congress, when does property imported from abroad, or from a sister State, so become part of the common mass of property within a State as to be subject to its unimpeded control? . . .

And although the precise question before us was not ruled in *Gibbons v. Ogden* and *Brown v. Maryland*, yet we think it was virtually involved and answered, and that this is demonstrated, among other cases, in *Bowman v. Chicago & Northwestern Railway Co.*, 125 U. S. 465. In the latter case, section 1553 of the Code of the State of Iowa as amended by c. 143 of the acts of the twentieth General Assembly in 1886, forbidding common carriers to bring intoxicating liquors into the State from any other State or Territory, without first being furnished with a certificate as prescribed, was declared invalid, because essentially a regulation of commerce among the States, and not sanctioned by the authority, express or implied, of Congress. The opinion of the court, delivered by Mr. Justice Matthews, the concurring opinion of Mr. Justice Field, and the dissenting opinion by Mr. Justice Harlan, on behalf of Mr. Chief Justice Waite, Mr. Justice Gray, and himself, discussed the question involved in all its phases; and while the determination of whether the right of transportation of an article of commerce from one State to another includes by necessary implication the right of the consignee to sell it in *unbroken packages* at the place where the transportation terminates was in terms reserved, yet the argument of the majority conducts irresistibly to that conclusion, and we think we cannot do better than repeat the grounds upon which the decision was made to rest. It is there shown that the transportation of freight or of the subjects of commerce, for the purpose of exchange or sale, is beyond all question a constituent of commerce itself; that this was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several States; that the power to prevent embarrassing restrictions by any State was the end desired; that the power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations; and that it

would be absurd to suppose that the transmission of the subjects of trade from the State of the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade, either with foreign nations or among the States. It is explained that where State laws alleged to be regulations of commerce among the States, have been sustained, they were laws which related to bridges or dams across streams, wholly within the State, or police or health laws, or to subjects of a kindred nature, not strictly of commercial regulation. But the transportation of passengers or of merchandise from one State to another is in its nature national, admitting of but one regulating power; and it was to guard against the possibility of commercial embarrassments which would result if one State could directly or indirectly tax persons or property passing through it, or prohibit particular property from entrance into the State, that the power of regulating commerce among the States was conferred upon the federal government.

The doctrine now firmly established is, as stated by Mr. Justice Field, in *Bowman v. Chicago, etc., Railway Co.*, 125 U. S. 507, "that where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers; erection of wharves, piers, and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the State can act until Congress interferes and supercedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the States shall be unrestricted. It is only after the importation is completed, and the property imported has mingled with and become

a part of the general property of the State, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled."

The conclusion follows that, as the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power without the assent of Congress, and, in the absence of legislation, it is left for the courts to determine when State action does or does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce. When that is determined, controversy is at an end. Illustrations exemplifying the general rule are numerous. Thus we have held the following to be regulations of interstate commerce: A tax upon freight transported from State to State. *Case of the State Freight Tax*, 15 Wall. 232; a statute imposing a burdensome condition on ship-masters as a prerequisite to the landing of passengers, *Henderson v. Mayor of New York*, 92 U. S. 259; a statute prohibiting the driving or conveying of any Texas, Mexican or Indian cattle, whether sound or diseased, into the State between the first day of March and the first day of November in each year, *Railroad Co. v. Husen*, 95 U. S. 465; a statute requiring every auctioneer to collect and pay into the state treasury a tax on his sales, when applied to imported goods in the original packages by him sold for the importer, *Cook v. Pennsylvania*, 97 U. S. 566; a statute intended to regulate or tax, or to impose any other restrictions upon, the transmission of persons or property, or telegraphic messages, from one State to another, *Wabash, St. Louis, etc., Railway v. Illinois*, 118 U. S. 557; a statute levying a tax upon non-resident drummers offering for sale or selling goods, wares or merchandise by sample, manufactured or belonging to citizens of other States, *Robbins v. Shelby Taxing District*, 120 U. S. 489.

These decisions rest upon the undoubted right of the States of the Union to control their purely internal affairs, in doing which they exercise powers not surrendered to the national government; but whenever the law of the State amounts essentially to a regulation of commerce with foreign nations or among the States, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity or its disposition before it has ceased to become an article of trade between one State and another

other, or another country and this, it comes in conflict with a power which, in this particular, has been exclusively vested in the general government, and is therefore void. . . .

Prior to 1888 the statutes of Iowa permitted the sale of foreign liquors imported under the laws of the United States, provided the sale was by the importer in the original casks or packages, and in quantities not less than those in which they were required to be imported; and the provisions of the statute to this effect were declared by the Supreme Court of Iowa, in *Pearson v. International Distillery*, 72 Iowa, 348, 354, to be "intended to conform the statute to the doctrine of the United States Supreme Court, announced in *Brown v. Maryland*, 12 Wheat. 419, and *License Cases*, 5 How. 504, so that the statute should not conflict with the laws and authority of the United States." But that provision of the statute was repealed in 1888, and the law so far amended that we understand it now to provide that, whether imported or not, wine cannot be sold in Iowa except for sacramental purposes, nor alcohol, except for specified chemical purposes, nor intoxicating liquors, including ale and beer, except for pharmaceutical and medicinal purposes, and not at all except by citizens of the State of Iowa, who are registered pharmacists, and have permits obtained as prescribed by the statute, a permit being also grantable to one discreet person in any township where a pharmacist does not obtain it.

The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit, but import into Iowa beer, which they sell in original packages, as described. Under our decision in *Bowman v. Chicago, etc., Railway Co.*, *supra*, they had the right to import this beer into that State, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that in the absence of congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer. . . .

The legislation in question is to the extent indicated repugnant to the third clause of section 8 of Art. 1 of the Constitu-

tion of the United States, and therefore the judgment of the Supreme Court of Iowa is

Reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice GRAY, with whom concurred Mr. Justice HARLAN and Mr. Justice BREWER, dissenting. . . .

CASES INVOLVING SALES BY SAMPLE.

WELTON v. MISSOURI.

91 United States 275. 1875.

Mr. Justice FIELD delivered the opinion of the court.

This case comes before us on a writ of error to the Supreme Court of Missouri, and involves a consideration of the validity of a statute of that State, discriminating in favor of goods, wares, and merchandise which are the growth, product, or manufacture of the State, and against those which are the growth, product, or manufacture of other States or countries, in the conditions upon which their sale can be made by travelling dealers. The plaintiff in error was a dealer in sewing-machines which were manufactured without the State of Missouri, and went from place to place in the State selling them without a license for that purpose. For this offense he was indicted and convicted in one of the circuit courts of the State, and was sentenced to pay a fine of fifty dollars, and to be committed until the same was paid. On appeal to the Supreme Court of the State, the judgment was affirmed.

The statute under which the conviction was had declares that whoever deals in the sale of goods, wares, or merchandise, except books, charts, maps, and stationery, which are not the growth, produce, or manufacture of the State, by going from place to place to sell the same, shall be deemed a peddler; and then enacts that no person shall deal as a peddler without a license,

and prescribes the rates of charge for the licenses, these varying according to the manner in which the business is conducted, whether by the party carrying the goods himself on foot, or by the use of beasts of burden, or by carts or other land carriage, or by boats or other river vessels. Penalties are imposed for dealing without the license prescribed. No license is required for selling in a similar way, by going from place to place in the State, goods which are the growth, product, or manufacture of the State.

The license charge exacted is sought to be maintained as a tax upon a calling. It was held to be such a tax by the Supreme Court of the State; a calling, says the court, which is limited to the sale of merchandise not the growth or product of the State.

The general power of the State to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the Federal Constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license. . . .

So, in like manner, the license tax enacted by the State of Missouri from dealers in goods which are not the product or manufacture of the State, before they can be sold from place to place within the State, must be regarded as a tax upon such goods themselves; and the question presented is, whether legislation thus discriminating against the products of other States in the conditions of their sale by a certain class of dealers is valid under the Constitution of the United States. It was contended in the State courts, and it is urged here, that this legislation violates that clause of the Constitution which declares that Congress shall have the power to regulate commerce with foreign nations and among the several States. The power to regulate conferred by that clause upon Congress is one without limitation; and to regulate commerce is to prescribe rules by

which it shall be governed,—that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited.

Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different States. The power to regulate it embraces all the instruments by which such commerce may be conducted. So far as some of these instruments are concerned, and some subjects which are local in their operation, it has been held that the States may provide regulations until Congress acts with reference to them; but where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all State authority.

It will not be denied that that portion of commerce with foreign countries and between the States which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the General Government was to insure this uniformity against discriminating State legislation. The depressed condition of commerce and the obstacles to its growth previous to the adoption of the Constitution, from the want of some single controlling authority, has been frequently referred to by this court in commenting upon the power in question. . . .

The power which insures uniformity of commercial regulation must cover the property which is transported as an article of commerce from hostile or interfering legislation, until it has mingled with and become a part of the general property of the country, and subjected like it to similar protection, and to no greater burdens. If, at any time before it has thus become incorporated into the mass of property of the State or nation, it can be subjected to any restrictions by State legislation, the object of investing the control in Congress may be entirely defeated. If Missouri can require a license tax for the sale by traveling dealers of goods which are the growth, product, or

manufacture of other States or countries, it may require such license tax as a condition of their sale from ordinary merchants, and the amount of the tax will be a matter resting exclusively in its discretion.

The power of the State to exact a license tax of any amount being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating State legislation, favorable to the interests of one State and injurious to the interests of other States and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the States.

The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled. As the main object of that commerce is the sale and exchange of commodities, the policy thus established would be defeated by discriminating legislation like that of Missouri.

The views here expressed are not only supported by the case of *Brown v. Maryland*, already cited, but also by the case of *Woodruff v. Parham*, 8 Wall. 123, and the case of the *State Freight Tax*, 15 Wall. 232. In the case of *Woodruff v. Parham*, Mr. Justice Miller, speaking for the court, after observing, with respect to the law of Alabama then under consideration, that there was no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case was not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity, said, "But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects, and therefore void."

The judgment of the Supreme Court of the State of Missouri must be reversed, and the cause remanded with

directions to enter a judgment reversing the judgment of the Circuit Court, and directing that court to discharge the defendant from imprisonment, and suffer him to depart without day.

ROBBINS v. SHELBY COUNTY TAXING DISTRICT.

120 United States 489. 1887.

Mr. Justice BRADLEY delivered the opinion of the court.

This case originated in the following manner: Sabine Robbins, the plaintiff in error, in February, 1884, was engaged at the city of Memphis, in the State of Tennessee, in soliciting the sales of goods for the firm of Rose, Robbins & Co., of Cincinnati, in the State of Ohio, dealers in paper, and other articles of stationery, and exhibited samples for the purpose of effecting such sales,—an employment usually denominated as that of a “drummer.” There was in force at that time a statute of Tennessee, relating to the subject of taxation in the Taxing Districts of the State, applicable, however, only to the Taxing Districts of Shelby County (formerly the city of Memphis), by which it was enacted, amongst other things, that “All drummers, and all persons not having a regular licensed house of business in the Taxing District, offering for sale or selling goods, wares, or merchandise therein, by sample, shall be required to pay to the county trustee the sum of \$10 per week, or \$25 per month, for such privilege, and no license shall be issued for a longer period than three months.” Act of 1881, c. 96, § 16.

The business of selling by sample and nearly sixty other occupations had been by law declared to be privileges, and were taxed as such, and it was made a misdemeanor, punishable by a fine of not less than five, nor more than fifty dollars, to exercise any of such occupations without having first paid the tax or obtained the license required therefor.

Under this law, Robbins, who had not paid the tax nor taken a license, was prosecuted, convicted and sentenced to pay a fine of ten dollars, together with the State and county tax, and costs; and on appeal to the Supreme Court of the State, the judgment

was affirmed. This writ of error is brought to review the judgment of the Supreme Court, on the ground that the law imposing the tax was repugnant to that clause of the Constitution of the United States which declares that Congress shall have power to regulate commerce among the several States.

The principal question argued before the Supreme Court of Tennessee was, as to the constitutionality of the act which imposed the tax on drummers; and the court decided that it was constitutional and valid.

That is the question before us, and it is one of great importance to the people of the United States, both as it respects their business interests and their constitutional rights. It is presented in a nutshell, and does not, at this day, require for its solution any great elaboration of argument or review of authorities. Certain principles have been already established by the decisions of this court which will conduct us to a satisfactory decision. Among those principles are the following:

1. The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system, or plan of regulation. This was decided in the case of *Cooley v. Board of Wardens of the Port of Philadelphia*, 12 How. 299, 319, and was virtually involved in the case of *Gibbons v. Ogden*, 9 Wheat. 1, and has been confirmed in many subsequent cases, amongst others, in *Brown v. Maryland*, 12 Wheat. 419; *The Passenger Cases*, 7 How. 283; *Crandall v. Nevada*, 6 Wall. 35, 42; *Ward v. Maryland*, 12 Wall. 418, 430; *State Freight Tax Cases*, 15 Wall. 232, 279; *Henderson v. Mayor of New York*, 92 U. S. 259, 272; *Railroad Co. v. Husen*, 95 U. S. 465, 469; *Mobile v. Kimball*, 102 U. S. 691, 697; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203; *Wabash, etc., Railway Co. v. Illinois*, 118 U. S. 557.

2. Another established doctrine of this court is, that where the power of Congress to regulate is exclusive the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the States, except in mat-

tary of local concern only, as hereafter mentioned, is repugnant to such freedom. This was held by Mr. Justice Johnson in *Gibbons v. Ogden*, 9 Wheat. 1, 22; by Mr. Justice Grier in the *Passenger Cases*, 7 How. 283, 462, and has been affirmed in subsequent cases. *State Freight Tax Cases*, 15 Wall. 282, 279; *Railroad Co. v. Husen*, 95 U. S. 465, 469; *Welton v. Missouri*, 91 U. S. 275, 282; *Mobile v. Kimball*, 102 U. S. 691, 697; *Brown v. Houston*, 114 U. S. 622, 631; *Walling v. Michigan*, 116 U. S. 446, 456; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 84; *Wabash, etc., Railway Co. v. Illinois*, 118 U. S. 557, 561, 562, 563. It is also an established principle, as already indicated, that the only way in which commerce between the States can be legitimately affected by State law is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health, and comfort of persons and the protection of property, or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulations of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the State, or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce or with some other employment or business, exercised under authority of the Constitution and laws of the United States; and the imposition of taxes upon all property within the State, mingled with and forming part of the great mass of property therein. But in making such internal regulations a State cannot impose taxes upon persons passing through the State, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the State from abroad, or from another State, and not yet become part of the common mass of property therein; and no discrimination can be made by any such regulations, adversely to the persons or property of other States; and no regulations can be made directly affecting interstate commerce. Any tax

tion or regulation of the latter character would be an unauthorized interference with the power given to Congress over the subject.

For authorities on this last head it is only necessary to refer to those already cited.

In a word, it may be said, that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject.

In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a State to levy a tax or impose any other restriction upon the citizens or inhabitants of other States, for selling or seeking to sell their goods in such State before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer, or a merchant, of one State, to sell his goods in another State, without, in some way, obtaining orders therefor?

If the selling of goods by sample and the employment of drummers for that purpose, injuriously affect the local interest of the States, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it; for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant, or retaliatory enactments of forty different States. The confusion into which the commerce of the country would be thrown by being subject to State legislation on this subject, would be but a repetition of the disorder which prevailed under the Articles of Confederation.

To say that the tax, if invalid as against drummers from other States, operates as a discrimination against the drummers of Tennessee, against whom it is conceded to be valid, is no argument; because the State is not bound to tax its own drummers; and if it does so whilst having no power to tax those of other States, it acts of its own free will, and is itself the author of such discrimination. As before said, the State may tax its own

internal commerce; but that does not give it any right to tax interstate commerce.

*The judgment of the Supreme Court of Tennessee is reversed, and the plaintiff in error must be discharged.**

EMERT v. MISSOURI.

156 United States 296. 1895.

This was an information, filed July 27, 1889, before a justice of the peace in the county of Montgomery and State of Missouri, for a misdemeanor, by peddling goods without a license, in violation of a statute of the State contained in chapter 137, entitled "Peddlers and their licenses" of the Revised Statutes of Missouri of 1879.

Mr. Justice GRAY, after stating the case, delivered the opinion of the court.

From early times, in England and America, there have been statutes regulating the occupation of itinerant peddlers, and requiring them to obtain licenses to practice their trade. . . .

The statute of Missouri, under which the conviction in the case at bar was had, is contained in a separate chapter of the Revised Statutes of the State, entitled "Peddlers and their licenses," and relating to no other subject. By this statute, "whoever shall deal in the selling of" any goods, wares or merchandise (except books, charts, maps and stationery), "by going from place to place to sell the same, is declared to be a peddler;" and is prohibited from dealing as a peddler without a license. Rev. Stat. of 1879, §§ 6471, 6472. The license is required to state how the dealing is to be carried on, whether on foot, or with one or more beasts of burden, a cart or wagon, or a boat or vessel; and may be obtained by any person paying the tax prescribed according to the manner in which the business is carried on. §§ 6473, 6476, 6477. Any person dealing as a peddler, without a license, whether with a pack, a wagon, or a boat,

* Mr. Chief Justice WAITE delivered a dissenting opinion in which Mr. Justice FIELD and Mr. Justice GRAY concurred.

is to pay a certain penalty, which, in the case of peddling in a cart or wagon, is fifty dollars. § 6478. And any peddler, who refuses to exhibit his license on demand of a sheriff, collector, constable, or citizen householder of the county, is to forfeit the sum of ten dollars. § 6479.

The facts were agreed, that the Singer Manufacturing Company, for more than five years last past, and on the day in question, was a corporation of New Jersey; that the defendant, on and prior to that day, was in the employment of that company, and on that day, in pursuance of that employment, and having no peddler's license, was engaged in going from place to place in Montgomery county in the State of Missouri, with a horse and wagon, soliciting orders for the sale of the company's sewing machines, and having with him in the wagon one of those machines, the property of the company, and manufactured by it at its works in New Jersey, and which it had forwarded and delivered to him for sale on its account; and that he offered this machine for sale to various persons at different places, and found a purchaser, and sold and delivered it to him.

The Supreme Court of the State, in its opinion, understood and assumed the effect of those facts to be as follows: "The defendant was engaged in going from place to place, selling and trying to sell sewing machines in Montgomery county in this State, and had been so engaged for some years. He carried the machines with him in a wagon, and on making a sale delivered those sold to the purchaser. He was not only soliciting orders, but was making sales and delivering the property sold. These acts bring him clearly within the statutory definition of a peddler; and, having no license from the State, he became liable to the penalties imposed by the statute, unless, for any reason, he was exempt from the operations of the law." 103 Missouri, 247. It is argued by one of his counsel that this was an unwarranted conclusion from the facts agreed. But the construction of those facts does not present a Federal question, except so far as it involves the constitutionality of the statute. Upon any construction, it is clear that the defendant was engaged in going from place to place within the State, without a license, soliciting orders for the sale of sewing machines, having with him in the wagon at least one of those machines, and offering that machine for sale to various persons at different places, and that

he finally sold it, and delivered it to the purchaser." The conclusion that such dealings made him a peddler, within the meaning of the statute of the State and of the information on which he was convicted, presents of itself no constitutional question.

The facts appear to have been agreed for the purpose of presenting the question whether the statute was repugnant to the Constitution of the United States. This was the only question discussed in the opinion of the Supreme Court of Missouri. And it is the only one of which this court has jurisdiction upon this writ of *habeas corpus*. The defendant's occupation was offering for sale and selling sewing machines, by going from place to place in the State of Missouri, in a wagon, without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one State to another; and were neither interstate commerce in themselves, nor were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal and domestic; and, so far as appears, the only goods in which he was dealing had become part of the mass of property within the State. Both the occupation and the goods, therefore, were subject to the taxing power, and to the police power, of the State.

The statute in question is not part of a revenue law. It makes no discrimination between residents or products of Missouri and those of other States; and manifests no intention to interfere, in any way, with interstate commerce. Its object, in requiring peddlers to take out and pay for licenses, and to exhibit their licenses, on demand, to any peace officer, or to any citizen, householder, or of the county, appears to have been to protect the citizens of the State against the cheats and frauds, or even thefts, which, as the experience of ages has shown, are likely to attend itinerant and irresponsible peddling from place to place, and from door to door.

If this question were now brought before this court for the first time, there could hardly be a doubt of the validity of the statute. But it is not a new question in this court.

The necessary conclusion, upon authority, as well as upon principle, is that the statute of Missouri, now in question, is

nowise repugnant to the power of Congress to regulate commerce among the several States, but is a valid exercise of the power of the State over persons and business within its borders.

Judgment affirmed.

POWER OF STATE OVER COMMERCE UNDER POLICE POWER.*

MUNN v. ILLINOIS.

94 United States 113, Decided 1876.

Error to the Supreme Court of the State of Illinois.

Mr. Chief Justice WARR delivered the opinion of the court:

The question to be determined in this case is whether the general assembly of Illinois can, under the limitations upon the legislative powers of the States imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the State having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved."

It is claimed that such a law is repugnant

To that part of sect. 8, art. 1, of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several States;"

To that part of sect. 9 of the same article, which provides that "no preference shall be given any regulation of commerce or revenue to the ports of one State over those of another;" and

To that part of amendment 14 which ordains that no State shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

* See, also, for cases under police power, *Cudley v. Board of Wardens of the port of Philadelphia*, 12 How. 1298 (1851); and *Lake Shore, Etc., Railway Co. v. Ohio*, 173 U. S. 235 (1899).

We will consider the last of these objections first.

Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.

The Constitution contains no definition of the word "deprive," as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth, as a guarantee against any encroachments upon an acknowledged right of citizenship by the legislatures of the States. . . .

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private (*Thorpe v. R. & V. Railroad Co.*, 27 Vt., 143); but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim, *sic utere tuo ut alienum non laedas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How., 583, "are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things." Under these powers the govern-

ment regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington "to regulate . . . the rates of wharfage at private wharves, . . . the sweeping of chimneys, and to fix the rates of fees therefor, . . . and the weight and quality of bread," 3 Stat. 587, sec. 7; and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers," 9 id. 224, sec. 2.

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such a deprivation. . . .

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiffs in error. From these it appears that "the great producing region of the West and North-west sends its grain by water and

rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard by the Great Lakes, and some of it is forwarded by railway to the Eastern ports. Vessels, to some extent, are loaded in the Chicago harbor, and sailed through the St. Lawrence directly to Europe. The quantity [of grain] received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called elevators, because the grain is elevated from the boat or car, by machinery operated by steam, into the bins prepared for its reception, and elevated from the bins, by a like process, into the vessel or car, which is to carry it on. In this way the largest traffic between the citizens of the country north and west of Chicago and the citizens of the country lying on the Atlantic coast north of Washington is in grain which passes through the elevators of Chicago. In this way the trade in grain is carried on by the inhabitants of seven or eight of the great States of the West with four or five of the States lying on the sea-shore, and forms the largest part of interstate commerce in these States. The grain warehouses or elevators in Chicago are immense structures holding from 200,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength. They are located with the river harbor on one side, and the railway tracks on the other, and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels, which are negotiable, and redeemable in like kind upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has, therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit.

"In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great States of the West" must pass on the way "to four or five of the States on the seashore" may be a "virtual" monopoly. Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very "gateway of commerce," and take toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation, viz., that he should take but a reasonable toll." Certainly, if any business can be clothed "with a public interest and cease to be *purely* private only," this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts. It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not

have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted.

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge

for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts.

After what has already been said, it is unnecessary to refer at length to the effect of the other provision of the Fourteenth Amendment which is relied upon, viz., that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Certainly, it cannot be claimed that this prevents the State from regulating the fares of hackmen or the charges of draymen in Chicago, unless it does the same thing in every other place within its jurisdiction. But, as has been seen, the power to regulate the business of warehouses depends upon the same principle as the power to regulate hackmen and draymen, and what cannot be done in the one case in this particular cannot be done in the other.

We come now to consider the effect upon this statute of the power of Congress to regulate commerce.

It was very properly said in the case of the State Tax on Railway Gross Receipts, 15 Wall., 293, that "it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution." The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a State, under the

form of regulating its own affairs, has encroached upon the exclusive domain of Congress, in respect to interstate commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done.

The remaining objection, to wit, that the statute in its present form is repugnant to sect. 9, art. 1, of the Constitution of the United States, because it gives preference to the ports of one State over those of another, may be disposed of by the single remark that this provision operates only as a limitation of the powers of Congress, and in no respect affects the States in the regulation of their domestic affairs.

We conclude, therefore, that the statute in question is not repugnant to the Constitution of the United States, and that there is no error in the judgment. In passing upon this case we have not been unmindful of the vast importance of the questions involved. This and cases of a kindred character were argued before us more than a year ago by most eminent counsel, and in a manner worthy of their well-earned reputations. We have kept the cases long under advisement, in order that their decision might be the result of our mature deliberations.

Judgment affirmed.

[Mr. Justice FIELD rendered a dissenting opinion, in which Mr. Justice STRONG concurred.]

ANTI-TRUST LEGISLATION. SHERMAN ACT OF 1890.

NORTHERN SECURITIES COMPANY V. UNITED STATES.

193 U. S. Reports, 197. Decided March 14, 1904.

Mr. Justice HARBAN announced the affirmance of the decree of the circuit court and delivered the following opinion:

This suit was brought by the United States against the Northern Securities Company, a corporation of New Jersey; the great Northern Railway Company, a corporation of Minnesota; the Northern Pacific Railway Company, a corporation of Wisconsin;

James J. Hill, a citizen of Minnesota, and Wm. P. Clough, Dr. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont, citizens of New York.

Its general object was to enforce, as against the defendants the provisions of the statute of July 2d, 1890, commonly known as the Anti-Trust Act, and entitled "An Act to protect trade and commerce against unlawful restraints and monopolies." 26 Stat., 209. By the decree below, the United States was given substantially the relief asked by it in bill.

As the act is not very long, and as the determination of the particular questions arising in this case may require the consideration of the scope, and meaning of most of its provisions, it is here given in full:

"Sec. I. Every contract, combination in the form of Trusts or otherwise or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.

"Sec. II. Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.

"Sec. III. Every contract, combination in form of trusts or otherwise or conspiracy, in restraint of trade or commerce in any territory of the United States or of the District of Columbia, or in the restraint of trade or commerce between any such territory and another, or between any such territory or territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.

"Sec. IV. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this

act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed as soon as may be, to the hearing and determination of the case; and, pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

"Sec. V. Whenever it shall appear to the court before which a proceeding under section IV of this act may be pending, that the ends of justice require that other parties be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof.

"Sec. VI. Any property owned under any contract, or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section I of this act, and being in the course of transportation from one state to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by life proceedings as those provided by the law for the forfeiture, seizure and condemnation of property imported in the United States, contrary to law.

"Sec. VII. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefore in any circuit court in the United States, in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

"Sec. VIII. That the word, 'person,' or 'persons' whenever used in this act shall be deemed to include corporations, and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any State, or the laws of any foreign country."

Is the case as presented by the pleadings and the evidence one of the combination or a conspiracy in restraint in trade or commerce among the states, or with foreign states? Is it one in which the defendants are properly chargeable with monopolizing or attempting to monopolize any part of such trade or commerce? Let us see, what are the facts disclosed by the record.

The Great Northern Railway Company and the Northern

Pacific Railway Company, owned, controlled and operated separate lines of railway—the former road, extending from Superior and from Duluth and St. Paul, to Everett, Seattle, and Portland, with a branch line to Helena; the latter, extending from Ashland, and from Duluth and St. Paul, to Helena, Spokane, Seattle, Tacoma and Portland. The two lines, main and branches, about 9,000 miles in length, were and are parallel and competing lines across the continent through the northern tier of states between the Great Lakes and the Pacific, and the two companies were engaged in active competition for freight and passenger traffic, each road connecting at its respective terminals with lines of railway, or with lake and river steamers, or with seagoing vessels.

Prior to 1893 the Northern Pacific system was owned or controlled and operated by the Northern Pacific Railroad Company, a corporation organized under certain acts and resolutions of Congress. That company becoming insolvent, its road and property passed into the hands of receivers appointed by courts of the United States. In advance of foreclosure and sale a majority of its bondholders made an arrangement with the Great Northern Railway Company for a virtual consolidation of the two systems, and for giving the practical control of the Northern Pacific to the Great Northern. That was the arrangement declared in *Pearsall v. Great Northern Railway Company*, 161 U. S., 646, to be illegal under the statutes of Minnesota which forbade any railroad corporation or the purchasers or managers of any corporation, to consolidate the stock, property or franchise of such corporation, or to lease or purchase the works or franchises of, or in any way control other railroad corporations owning or having under their control parallel or competing lines. Gen. Laws, Minn., 1874, c. 29; ch. 1881.

Early in 1901 the Great Northern and the Northern Pacific Railway companies, having in view the ultimate placing of their two systems under a common control, united in the purchase of the capital stock of the Chicago, Burlington and Quincy Railway Company, giving in payment, upon an agreed basis of exchange, the joint bonds of the Great Northern and Northern Pacific Railway companies, payable in twenty years from date, with interest at 4 per cent per annum. In this manner the two purchasing companies became the owners of \$107,000,000

of the \$112,000,000 total capital stock of the Chicago, Burlington and Quincy Railway Company, whose lines aggregated about 8,000 miles, and extended from St. Paul to Chicago, and from St. Paul and Chicago to Quincy, Burlington, Des Moines, St. Louis, Kansas City, St. Joseph, Omaha, Lincoln, Denver, Cheyenne and Billings, where it connected with the Northern Pacific railroad. By this purchase of stock the Great Northern and Northern Pacific acquired full control of the Chicago, Burlington and Quincy main line and branches.

Prior to November 12, 1901, defendant Hill, and associate stockholders of the Great Northern Railway Company, and defendant Morgan, and associate stockholders of the Northern Pacific Railway Company, entered into a combination to form under the laws of New Jersey, a holding corporation to be called the Northern Securities Company, with a capital stock of \$400,000,000, and to which company, in exchange for its own capital stock upon a certain basis and at a certain rate, was to be turned over the capital stock, or a controlling interest in the capital stock, of each of the constituent railway companies, with power in the holding corporation to vote such stock, to act as the owner thereof, or to do whatever it might deem necessary in aid of such railway companies, or to enhance the value of their stocks. In this manner the interests of individual stockholders in the property and franchises of the two independent and competing railway companies were to be converted into an interest in the property and franchises of the holding corporation. Thus as stated in Article VI of the bill, "by making the stockholders of each system jointly interested in both systems, and by practically pooling the earnings of both for the benefit of the former stockholders of each, and by vesting the selection of the directors and officers of each system in a common body, to wit, with holding corporations, with not only the power but the duty to pursue a policy which would promote the interests, not of one system at the expense of the other, but of both at the expense of the public, all inducements for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established."

In pursuance of this combination and to effect its objects, the

defendant, the Northern Securities Company, was organized November 13, 1901, under the laws of New Jersey. Its certificate of incorporation stated that the objects for which the company was formed were:

To acquire by purchase, subscriptions or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country. 2. To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of any bonds or other securities or evidences of indebtedness created or issued by any other corporation, or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country, and while owner thereof to exercise all rights, powers and privileges of ownership. 3. To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of shares of the capital stock of any other corporation or corporations, association, or associations, of the State of New Jersey, or of any other State, Territory or country, and while owner of such stock to exercise all the rights, powers and privileges of ownership including the right to vote thereon. 4. To aid in any manner, any corporation or association of which any bonds or other securities or evidences of indebtedness or stock are held by the corporation and to do any acts or things designed to protect, preserve, improve or enhance the value of any such bonds or other securities or evidences of indebtedness or stock. 5. To acquire, own and hold such real and personal property as may be necessary or convenient for the transaction of its business."

No consideration whatever, the bill alleges, has existed or will exist for the transfer of the stock of the defendant railway companies to the Northern Securities Company, other than the issue of the stock of the latter company for the purpose, after the manner and upon the basis stated.

The Securities Company, the bill also alleges, was not organized in good faith to purchase and pay for the stocks of the Great Northern and Northern Pacific Railway companies, but solely "to incorporate the pooling of the stocks of said companies," and carry into effect the above combination; that it is a mere depository, custodian, holder or trustee of the stocks of the Great Northern and Northern Pacific Railway companies, and that its shares of stock are but beneficial certificates against said railroad stocks, to designate the interest of the holders in the pool; that it does not have and never had any capital to pay

rant such an operation; that its subscribed capital was but \$30,000, and its authorized capital stock of \$400,000,000 was just sufficient, when all issued, to represent and cover the exchange value of substantially the entire stock of the Great Northern and Northern Pacific Railway companies, upon the basis and at the rate agreed upon, which was about \$122,000,000 in excess of the combined capital stock of the two railway companies, taken at par, and that, unless prevented, Securities company as owner and proprietor, substantially all the capital stock of the Great Northern and Northern Pacific Railway companies, issuing in lieu thereof its own capital stock to the full extent of its authorized issue, of which, upon the agreed basis of exchange, the former stockholders of the Great Northern Railway Company have received or would receive and hold about fifty-five per cent, the balance going to the former stockholders of the Northern Pacific Railway Company.

The Government charges that if the combination was held not to be in violation of the act of Congress, then all efforts of the National Government to preserve to the people the benefits of free competition among carriers engaged in interstate commerce will be wholly unavailing, and all transcontinental lines, indeed the entire railway systems of the country, may be absorbed, merged and consolidated, thus placing the public at the absolute mercy of the holding corporation.

The several defendants denied all the allegations of the bill imputing to them a purpose to evade the provisions of the act of Congress, or to form a combination or conspiracy having for its object either to restrain or to monopolize commerce or trade among the States or with foreign nations. They denied that any combination or conspiracy was formed in violation of the act.

In our judgment, the evidence fully sustains the material allegations of the bill, and shows a violation of the act of Congress, in so far as it declares illegal every combination or conspiracy in restraint of commerce among the several States and with foreign nations, and forbids attempt to monopolize such commerce or any part of it. . . .

No scheme or device could more certainly come within the words of the act,—“combination in the form of a trust or otherwise . . . in restraint of commerce among the several States

or with foreign nations,"—or could more effectively and certainly suppress free competition between the constituent companies. This combination is, within the meaning of the act, a "trust," but if not, it is a *combination in restraint of interstate and international commerce*; and that is enough to bring it under the condemnation of the act. The mere existence of such a combination and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected. If such combination be not destroyed, all the advantages that would naturally come to the public under the operation of the general laws of competition, as between the Great Northern and Northern Pacific Railway companies, will be lost, and the entire commerce of the immense territory in the northern part of the United States between the Great Lakes, and the Pacific at Puget Sound will be at the mercy of a single holding corporation, organized in a state distant from the people of that territory.

The Circuit Court was undoubtedly right when it said—all the judges of that court concurring—that the combination referred to "led inevitable to the following results: First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, by virtue of its ownership of a large majority of the stock of both companies; second, it destroyed every motive for competition between two roads engaged in interstate traffic, which were natural competitors for business, by pooling the earnings of the two roads for the common benefit of the stockholders of both companies." 120 Fed. Rep. 721, 124. . . .

The first case in this court arising under the Anti-Trust Act was *United States v. E. C. Knight Co.*, 156 U. S., 1. The next case was that of *United States v. Trans-Missouri Freight Association*, 166 U. S., 395. That was followed by *United States v. Joint Traffic Association*, 171 U. S., 505, *Hopkins v. United States*, 171 U. S., 578, *Anderson v. United States*, 171 U. S., 604, *Addyston Pipe & Steel Co. v. United States*, 175 U. S., 211, and *Montague & Co. v. Lowry*, 193 U. S., 38. To these may be added *Pearsall v. Great Northern Railway*, 161 U. S., 646, which, although not arising under the Anti-Trust Act, involved an agreement under which the Great Northern and Pacific Railway com-

panies should be consolidated and by which competition between those two companies was to cease. In *United States v. E. C. Knight Co.*, it was held that the agreement or arrangement there involved had reference only to the manufacture or production of sugar by those engaged in the alleged combination; but if it had directly embraced interstate or international commerce, it would then have been covered by the Anti-Trust Act, and would have been illegal; in *United States v. Trans-Missouri Freight Association*, that an agreement between certain railroad companies providing for establishing and maintaining, for their mutual protection, reasonable rates, rules and regulations in respect of freight traffic through and local, and by which free competition among those companies was restricted, was, by reason of such restriction, illegal under the Anti-Trust Act; in *United States v. Joint Traffic Association*, that an arrangement between certain railroad companies in reference to railroad traffic among the States, by which the railroads involved were not subject to competition among themselves, was also forbidden by the act; in *Hopkins v. United States* and *Anderson v. United States*, that the act embraced only agreements that had direct connection with interstate commerce, and that such commerce comprehended intercourse for all the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between citizens of different States, and the power to regulate it embraced all the instrumentalities by which such commerce is conducted; in *Addyston Pipe & Steel Co. v. United States*, all the members of the court concurring that the act of Congress made illegal an agreement between certain private companies or corporations engaged in different States in the manufacture, sale and transportation of iron pipe, whereby competition among them was avoided, was covered by the Anti-Trust Act; and in *Montague v. Lowry*, all the members of the court again concurring, that a combination created by an agreement between certain private manufacturers and dealers in tiles, grates and mantels in different States, whereby they controlled, or sought to control the price of such articles in those States, was condemned by the act of Congress. In *Pearsall v. Great Northern Railway*, which, as already stated, involved the consolidation of the Great Northern and the Northern Pacific Railway companies, the court said: "The consolidation

tion of these two great corporations will unavoidably result in giving to the defendant (the Great Northern) a monopoly of all traffic in the northern half of the State of Minnesota, as well as of all trans-continental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection. The acts of the Minnesota Legislature of 1874 and 1881 undoubtedly reflected the general sentiment of the public, that their best security is in competition.

We will not incur this opinion by extended extracts from the former opinions of this court. It is sufficient to say that from the decisions in the above cases certain propositions are plainly deducible and embrace the present case. Those propositions are:

1. That although the act of Congress known as the Anti-Trust Act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it does embrace and declare to be illegal every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever may be the parties in it, which directly or necessarily operates in restraint of trade or commerce among the several States or with foreign nations.

2. That the act is not limited to restraints of interstate and international trade or commerce, that are unreasonable in their nature, but embraces all direct restraints imposed by any combination, conspiracy, or monopoly upon such trade or commerce;

3. That railroad carriers engaged in interstate or international trade or commerce are embraced by the act;

4. That combinations even among private manufacturers or dealers whereby interstate or international commerce is restrained are equally embraced by the act;

5. That Congress has the power to establish rules by which Interstate and International commerce shall be governed, and by the Anti-Trust Act, has prescribed the rule of free competition among those engaged in such commerce;

6. That every combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce, is made illegal by the Act;

7. That the natural effect of competition is to increase commerce, and an agreement whose direct effort is to prevent this

play of competition restrains instead of promotes trade and commerce;

That to vitiate a combination, such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition;

That the constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in *interstate and international* commerce; and,

That under its power to regulate commerce among the several States and with foreign nations, Congress had authority to enact the statute in question. . . .

The means employed in respect of the combinations forbidden by the Anti-Trust Act, and which Congress deemed germane to the end to be accomplished, was to prescribe as *a rule for interstate and international* commerce (not for domestic commerce), that it should not be vexed by combinations, conspiracies or monopolies which restrain commerce by destroying or restricting competition. We say that Congress has prescribed such a rule, because in all the prior cases in this court the Anti-Trust Act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Now, can this court say that such a rule is prohibited by the Constitution or is not one that Congress could appropriately prescribe when exerting its power under the commerce clause of the Constitution? Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history.

Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment of Congress the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be for all, the end of the matter, if this is to remain a government of laws, and not of men. . . .

Now, the court is asked to adjudge that, if held to embrace the case before us, the Anti-Trust Act is repugnant to the Constitution of the United States. In this view we are unable to concur. The contention of the defendants could not be sustained without, in effect, overruling the prior decisions of this court as to the scope and validity of the Anti-Trust Act. If, as the court has held, Congress can strike down a combination between private persons or private corporations that restrains trade among the States in iron pipe (as in *Addyston Pipe & Steel Co. v. United States*), or in tiles, grates and mantels (as in *Montague v. Lowry*), surely it ought not to be doubted that Congress has power to declare illegal a combination that restrains commerce among the States, and with foreign nations, as carried on over the lines of competing railroad companies exercising public franchises, and engaged in such commerce. We cannot agree that Congress may strike down combinations among manufacturers and dealers in iron pipe, tiles, grates and mantels that restrain commerce among the States in such articles but may not strike down combinations among stockholders of competing railroad carriers, which restrain commerce as involved in the transportation of passengers and property among the several States. If private parties may not, by combination among themselves, restrain interstate and international commerce in violation of an act of Congress, much less can such restraint be tolerated when imposed or attempted to be imposed upon commerce as carried on over public highways. Indeed, if the contentions of the defendants are sound why may not *all* the railway companies in the United States, that are engaged, under state charters, in interstate and international commerce, enter into a combination such as the one here in question, and by the device of a holding corporation obtain the absolute control throughout

the entire country of rates for passengers and freight, beyond the power of Congress to protect the public against their exactions. The argument in behalf of the defendants necessarily leads to such results and places Congress, although invested by the people of the United States with full authority to regulate interstate and international commerce, in a condition of utter helplessness, so far as the protection of the public against such combinations is concerned.

Will it be said that Congress can meet such emergencies by prescribing the rates by which interstate carriers shall be governed in the transportation of freight and passengers? If Congress has the power to fix such rates and upon that question we express no opinion, it does not choose to exercise its power in that way or to that extent. It has all will, agrees, a large discretion as to the means to be employed in the exercise of any power granted to it. For the present, it has determined to go no further than to protect the freedom of commerce among the States, and with foreign States by declaring illegal all contracts, combinations, conspiracies, or monopolies in restraint of such commerce, and make it a public offense to violate the rule thus prescribed. How much further it may go, we do not now say. We need only at this time consider whether it has exceeded its powers in enacting the statute here in question. No State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such companies. It cannot be said that any State may give a corporation, created under its laws, authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a State is necessarily subject to the supreme law of the land. And yet the suggestion is made that to restrain a state corporation from interfering with the free course of trade and commerce among the States, in violation of an act of Congress, is hostile to the reserved rights of the States. The Federal Court may not have power to forfeit the charter of the Securities Company; it may not declare how its

shares of stock may be transferred on its books, nor prohibit it from acquiring real estate, nor diminish or increase its capital stock. All these and like matters are to be regulated by the State which created the company. But to the end that effect be given to the national will, lawfully expressed, Congress may prevent that company, in its capacity as a holding corporation and trustee, from carrying out the purposes of a combination formed in restraint of interstate commerce. The Securities Company is itself a part of the present combination; its head and front; its trustee. It would be extraordinary if the court, in executing the act of Congress, could not lay hands upon that company and prevent it from doing that which, if done, will defeat the act of Congress. Upon like grounds the court can, by appropriate orders, prevent the two competing railroad companies here involved from co-operating with the Securities Company in restraining commerce among the States. In short, the court may make any order necessary to bring about the dissolution or suppression of any illegal combination that restrains interstate commerce. All this can be done without infringing in any degree upon the just authority of the States. The affirmance of the judgment below will only mean that no combination, however powerful, is stronger than the law or will be permitted to avail itself of the pretext that to prevent it doing that which, if done, would defeat a legal enactment of Congress, is to attack the reserved right of the States. It would mean that the Government, which represents all, can, when acting within the limits of its powers, compel obedience to its authority. It would mean that no device in evasion of its provisions, however skillfully such device may have been contrived, and no combination, by whomsoever formed, is beyond the reach of the supreme law of the land, if such device or combination by its operation directly restrains commerce among the States or with foreign nations in violation of the act of Congress.

The combination here in question may have been for the pecuniary benefit of those who formed or caused it to be formed. But the interests of private persons and corporations cannot be paramount to the interests of the general public. Under the Articles of Confederation commerce among the original States was subject to various and local regulations that took no ac-

count of the general welfare. But it was for the protection of the general interests, as involved in interstate and international commerce, that Congress, representing the whole country, was given by the Constitution full power to regulate commerce among the States and with foreign nations. In *Brown v. Maryland*, 12 Wheat., 419, 446, it was said: "Those who felt the injury arising from this state of things, and those who were incapable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal Government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress." Railroad companies, we said in the *Trans-Missouri Freight Association* case, "Are instruments of commerce, and their business is commerce itself." And such companies, it must be remembered, operate "public highways, established primarily for the convenience of the people, and therefore are subject to governmental control and regulation." *Cherokee Nation v. Kansas Railway Co.*, 135 U. S., 641, 657; *Chicago, &c., R. R. Co. v. Pullman Car Co.*, 139 U. S., 79, 90; *Interstate Commerce Commission v. Brimson*, 154 U. S., 447, 475; *United States v. Trans-Missouri Freight Association*, 166 U. S., 290, 232; *Smythe v. Ames*, 16 U. S., 466, 544; *Lake Shore, &c., Ry. Co. v. Ohio*, 173 U. S., 285, 301. When such carriers in the exercise of public franchises engage in the transportation of passengers and freight among the States they become,—even if they be state corporations—subject to such rules as Congress may lawfully establish for the conduct of interstate commerce. . . .

We will now inquire as to the nature and extent of the relief granted to the Government by the decree below.

By the decree in the Circuit Court it was found and adjudged that the defendants had entered into a combination or conspiracy in restraint of trade or commerce among the several States, such as the act of Congress denounced as illegal; and that all the stocks of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, claimed to be owned and held by the Northern Securities Company was acquired, and is by it held, in virtue of such combina-

tion or conspiracy, in restraint of trade and commerce among the several States. It was therefore decreed as follows:

"That the Northern Securities Company, its officers, agents, servants and employers, be and they are hereby enjoined from acquiring, or attempting to acquire, further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company, and the Great Northern Railway Company, their officers, directors, servants and agents, be and they are hereby respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies; that they, together with their officers, directors, servants and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants and agents, be enjoined from permitting or suffering the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company and the Great Northern Railway Company respectively any and all shares of stock in either of said railway companies which said, The Northern Securities Company, may have heretofore received from such stockholders in exchange for its own stock, and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

No valid objection can be made to the decree below, in form or in substance. If there was a combination or conspiracy in violation of the act of Congress, between the stockholders of the

Great Northern and the Northern Pacific Railway Companies, whereby the Northern Securities Company was formed as a holding corporation, and whereby interstate commerce over the lines of the constituent companies was restrained, it must follow that the court, in execution of that act, and to defeat the efforts to evade it, could prohibit the parties to the combination from doing the specific things which being done would affect the result denounced by the act. To say that the court could not go so far is to say that it is powerless to enforce the act or to suppress the illegal combination, and powerless to protect the rights of the public as against that combination.

It is here suggested that the alleged combination had accomplished its object before the commencement of this suit, in that the Securities Company had been organized, and had actually received a majority of the stock of the two constituent companies, *therefore* it is argued, no relief can now be granted to the Government. This same view was pressed upon the Circuit Court, and was rejected. It was completely answered by that Court, when it said, "Concerning the second contention, we observe that it would be a novel, not to say absurd interpretation of the Anti-Trust Act to hold that after an unlawful combination is formed and has acquired the power which it had no right to acquire, namely, to restrain commerce by suppressing competition, and is proceeding to use it, and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it."

Guided by these long-established rules of construction, it is manifest that if the Anti-Trust Act is held not to embrace a case such as is now before us, the plain intention of the legislative branch of the Government will be defeated. If Congress has not, by the words used in the act, described this and like cases, it would, we apprehend, be impossible to find words that would describe them. This, it must be remembered, is a suit in equity, instituted by authority of Congress "to prevent and restrain violations of the act," § 4, and the court, in virtue of a well settled rule governing proceedings in equity, may mould its decree so as to accomplish practical results—such results as law and justice demand. The defendants have no just cause to complain of the decree, in matter of law, and it should be affirmed.

The judgment of the court is that the decree below be and hereby is affirmed, with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require.

Affirmed.

Mr. Justice BREWER filed a concurring opinion, limiting somewhat the scope of the decision of the court.

Mr. Justice WHITE, with whom concurred Mr. Chief Justice FULLER, and Mr. Justice PECKHAM and Mr. Justice HOLMES, joined in a dissenting opinion.

CHAPTER VII.

WAR AND MILITARY POWER OF CONGRESS.*

MARTIN v. MOTT.

12 Wheaton, 19. Decided 1827.

The case is stated in the opinion of the court. . . .

STORY, J., delivered the opinion of the court.

This is a writ of error to the judgment of the court for the trial of impeachments and the correction of errors of the State of New York, being the highest court of that State, and is brought here in virtue of the 25th section of the Judiciary Act of 1789,† c. 20. The original action was a replevin for certain goods and chattels, to which the original defendant put in an avowry, and to that avowry there was a demurrer, assigning nineteen distinct and special causes of demurrer. Upon a joinder in demurrer, the supreme court of the State gave judgment against the avowant; and that judgment was affirmed by the high court to which the present writ of error is addressed.

The avowry, in substance, asserts a justification of the taking of the goods and chattels to satisfy a fine and forfeiture imposed upon the original plaintiff by a court-martial, for a failure to enter the service of the United States as a militiaman, when thereto required by the President of the United States, in pursuance of the act of the 28th of February, 1795. It is argued that this avowry is defective, both in substance and form; and it will be our business to discuss the most material of these objections; and as to others, of which no particular notice is taken, it is to be understood that the court are of opinion that they are either unfounded in fact or in law, and do not require any separate examination.

For the more clear and exact consideration of this subject, it

* See Secs. 161 to 163, Vol. 2, *Cyclopedia of Law*; also *Ex parte Milligan*, 4 Wallace 2 (1866).

† 1 Stats. at Large, 85.

may be necessary to refer to the constitution of the United States, and some of the provisions of the act of 1795. The constitution declares that congress shall have power "to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions"; and also "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States." In pursuance of this authority, the act of 1795 has provided, "that whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the State or States most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper." And like provisions are made for the other cases stated in the constitution. It has not been denied here that the act of 1795 is within the constitutional authority of congress, or that congress may not lawfully provide for cases of imminent danger of invasion, as well as for cases where an invasion has actually taken place. In our opinion there is no ground for a doubt on this point, even if it had been relied on, for the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil.

The power thus confided by congress to the President is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the Presi-

dent are addressed, may decide for himself, and equally open to be contested by every militiaman who shall refuse to obey the orders of the President? We are all of the opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. . . .

If we look at the language of the act of 1795, every conclusion drawn from the nature of the power itself is strongly fortified. The words are, "whenever the United States shall be invaded, or be in imminent danger of invasion, &c., it shall be lawful for the President, &c., to call forth such number of the militia, &c., as he may judge necessary to repel such invasion." The power itself is confided to the Executive of the Union, to him who is, by the constitution, "the commander-in-chief of the militia, when called into the actual service of the United States," whose duty it is to "take care that the laws be faithfully executed," and whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions. He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provisions of the law; and it would seem to follow as a necessary consequence that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law contemplates that, under such circumstances, orders shall be given to carry the power into effect; and it cannot therefore be a correct inference that any other person has a just right to disobey them. The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of cer-

tain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts. And in the present case, we are all of opinion that such is the true construction of the act of 1795. It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the constitution itself. In a free government, the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess, of public virtue and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny. . . .

Upon the whole, it is the opinion of the court that the judgment of the court for the trial of impeachments and the correction of errors ought to be reversed; and that the cause be remanded to the same court, with directions to cause a judgment to be entered upon the pleadings in favor of the avowant.

EX PARTE MILLIGAN.

4 Wallace, 2. Decided 1866.

This case came before the court upon a certificate of division from the judges of the Circuit Court for Indiana, on a petition for discharge from unlawful imprisonment. . . . [The facts are sufficiently stated in the opinion of the court.]

Mr. Justice DAVIS delivered the opinion of the court.

On the 10th day of May, 1865, Lambdin P. Milligan presented a petition to the Circuit Court of the United States for the District of Indiana, to be discharged from an alleged unlawful imprisonment. The case made by the petition is this: Milligan is a citizen of the United States; has lived for twenty years in Indiana; and, at the time of the grievances complained of, was not, and never had been in the military or naval service of the United States. On the 5th day of October, 1864, while at home, he was arrested by order of General Alvin P. Hovey, command-

ing the military district of Indiana; and has ever since been kept in close confinement.

On the 21st day of October, 1864, he was brought before a military commission, convened at Indianapolis, by order of General Hovey, tried on certain charges and specifications; found guilty, and sentenced to be hanged; and the sentence ordered to be executed on Friday, the 19th day of May, 1865.

On the 2d day of January, 1865, after the proceedings of the military commission were at an end, the Circuit Court of the United States for Indiana met at Indianapolis and empanelled a grand jury, who were charged to inquire whether the laws of the United States had been violated; and, if so, to make presentments. The court adjourned on the 27th day of January, having prior thereto discharged from further service the grand jury, who did not find any bill of indictment or make any presentment against Milligan for any offense whatever; and in fact, since his imprisonment, no bill of indictment has been found or presentment made against him by any grand jury of the United States.

Milligan insists that said military commission had no jurisdiction to try him upon the charges preferred, or upon any charges whatever, because he was a citizen of the United States and the State of Indiana, and had not been, since the commencement of the late Rebellion, a resident of any of the States whose citizens were arrayed against the government, and that the right of trial by jury was guaranteed to him by the Constitution of the United States.

The prayer of the petition was, that under the act of Congress, approved March 3d, 1863, entitled, "An act relating to habeas corpus and regulating judicial proceedings in certain cases," he may be brought before the court, and either turned over to the proper civil tribunal to be proceeded against according to the law of the land or discharged from custody altogether.

With the petition were filed the order for the commission, the charges and specifications, the findings of the court, with the order of the War Department reciting that the sentence was approved by the President of the United States, and directing that it be carried into execution without delay. The petition was presented and filed in open court by the counsel for Milli-

gan; at the same time the District Attorney of the United States for Indiana appeared, and, by the agreement of counsel, the application was submitted to the court. The opinions of the judges of the Circuit Court were opposed on three questions, which are certified to the Supreme Court:

1st. "On the facts stated in said petition and exhibits, ought a writ of habeas corpus to be issued?"

2d. "On the facts stated in said petition and exhibits, ought the said Lambdin P. Milligan to be discharged from custody as in said petition prayed?"

3d. "Whether, upon the facts stated in said petition and exhibits, the military commission mentioned therein had jurisdiction legally to try and sentence said Milligan in manner and form as in said petition and exhibits is stated?"

The importance of the main question presented by this record cannot be overstated; for it involves the very framework of the government and the fundamental principles of American liberty.

During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. Then, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. Now that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment. We approach the investigation of this case, fully sensible of the magnitude of the inquiry and the necessity of full and cautious deliberation. . . .

The controlling question in the case is this: Upon the facts stated in Milligan's petition, and the exhibits filed, had the military commission mentioned in it jurisdiction, legally, to try and sentence him? Milligan, not a resident of one of the rebellious States, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission, organized under the direction of the military com-

mander of the military district of Indiana. Had this tribunal the legal power and authority to try and punish this man?

No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty, and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle, and secured in a written Constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct to leave room for misconstruction or doubt of their true meaning. Those applicable to this case are found in that clause of the original Constitution which says, "That the trial of all crimes, except in case of impeachment, shall be by jury"; and in the fourth, fifth, and sixth articles of the amendments. The fourth proclaims the right to be secure in person and effects against unreasonable search and seizure; and directs that a judicial warrant shall not issue "without proof of probable cause supported by oath or affirmation." The fifth declares "that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor be deprived of life, liberty, or property, with-

out due process of law." And the sixth guarantees the right of trial by jury, in such manner and with such regulations that with upright judges, impartial juries, and an able bar, the innocent will be saved and the guilty punished. It is in these words: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." These securities for personal liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.

Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided.

. . .

Have any of the rights guaranteed by the Constitution been violated in the case of Milligan? and if so, what are they?

Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it "in one supreme court and such inferior courts as the Congress may from time to time ordain and establish," and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President, because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is "no unwritten criminal code to which resort can be had as a source of jurisdiction."

But it is said that the jurisdiction is complete under the "laws and usages of war."

It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in States which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.

Why was he not delivered to the Circuit Court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it; because Congress had declared penalties against the offenses charged, provided for their punishment, and directed that court to hear and determine them. And soon after this military tribunal was ended, the Circuit Court met, peacefully transacted its business, and adjourned. It needed no bayonets to protect it, and required no military aid to execute its judgments. It was held in a State, eminently distinguished for patriotism, by judges commissioned during the Rebellion, who were provided with juries, upright, intelligent, and selected by a marshal appointed by the President. The government had no right to conclude that Milligan, if guilty, would not receive in that court merited punishment; for its records disclose that it was constantly engaged in the trial of similar offenses, and was never interrupted in its administration of criminal justice. If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he "conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection," the law said, arrest him, confine him closely, render him powerless to do further mischief;

and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended.

Another guarantee of freedom was broken when Milligan was denied a trial by jury. The great minds of the country have differed on the correct interpretation to be given to the various provisions of the Federal Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is now assailed; but if ideas can be expressed in words, and language has any meaning, this right—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. The sixth amendment affirms that “in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,”—language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment, or presentment, before any one can be held to answer for high crimes, “excepts cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger;” and the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.

The discipline necessary to the efficiency of the army and navy required other and swifter modes of trial than are furnished by the common-law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. All other persons, citizens of States where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administra-

tion of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of State or political necessity. When peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution.

It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in a time of war the commander of an armed force (if, in his opinion, the exigencies of the country demand it, and of which he is the judge) has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for, and to the exclusion of, the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules. . . .

It is difficult to see how the safety of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as a military tribunal; and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law.

It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late Rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so in the case of a foreign invasion, martial rule may become a necessity in one State, when, in another, it would be "mere lawless violence." . . .

We do not deem it important to examine further the adjudged cases; and shall, therefore, conclude without any additional reference to authorities.

To the third question, then, on which the judges below were opposed in opinion an answer in the negative must be returned.

CHAPTER VIII.

EX POST FACTO LAWS.*

CALDER v. BULL.

3 Dallas, 386. Decided 1798.

In error from the State of Connecticut. The cause was argued at the last term (in the absence of the chief justice), and now the court delivered their opinions *seriatim*.

CHASE, J. The decision of one question determines, in my opinion, the present dispute. I shall, therefore, state from the record no more of the case than I think necessary for the consideration of that question only.

The legislature of Connecticut, on the second Thursday of May, 1795, passed a resolution or law, which, for the reasons assigned, set aside a decree of the court of probate for Hartford, on the 21st of March, 1793, which decree disapproved of the will of Normand Morrison, the grandson, made the 21st of August, 1779, and refused to record the said will; and granted a new hearing by the said court of probate, with liberty of appeal therefrom, in six months. A new hearing was had, in virtue of this resolution, or law, before the said court of probate, who, on the 27th of July, 1795, approved the said will, and ordered it to be recorded. At August, 1795, appeal was then had to the superior court at Hartford, who, at February term, 1796, affirmed the decree of the court of probate. Appeal was had to the supreme court of errors of Connecticut, who, in June, 1796, adjudged that there were no errors. More than eighteen months elapsed from the decree of the court of probate, on the 1st of March, 1793, and thereby Caleb Bull and wife were barred of all right of appeal, by a statute of Connecticut. There was no law of that State whereby a new hearing, or trial, before the said court of probate might be obtained. Calder and wife

* See Sec. 168, Vol. 2, Cyclopædia of Law.

claim the premises in question, in right of his wife, as heiress of N. Morrison, physician; Bull and wife claim under the will of N. Morrison, the grandson.

The counsel for the plaintiffs in error contend that the said resolution or law of the legislature of Connecticut, granting a new hearing in the above case, is an *ex post facto* law, prohibited by the constitution of the United States; that any law of the federal government, or of any of the state governments, contrary to the constitution of the United States, is void; and that this court possesses the power to declare such law void.

It appears to me a self-evident proposition, that the several state legislatures retain all the powers of legislation delegated to them by the state constitutions, which are not expressly taken away by the constitution of the United States. The establishing courts of justice, the appointment of judges, and the making regulations for the administration of justice within each State, according to its laws, on all subjects not intrusted to the federal government, appear to me to be the peculiar and exclusive province and duty of the state legislatures. All the powers delegated by the people of the United States to the federal government are defined, and no constructive powers can be exercised by it, and all the powers that remain in the state governments are indefinite, except only in the constitution of Massachusetts.

The effect of the resolution or law of Connecticut above stated, is to revise a decision of one of its inferior courts, called the court of probate for Hartford, and to direct a new hearing of the case by the same court of probate that passed the decree against the will of Normand Morrison. By the existing law of Connecticut, a right to recover certain property had vested in Calder and wife (the appellants) in consequence of a decision of a court of justice, but, in virtue of a subsequent resolution or law, and the new hearing thereof, and the decision in consequence, this right to recover certain property was divested, and the right to the property declared to be in Bull and wife, the appellees. The sole inquiry is, whether this resolution or law of Connecticut, having such operation, is an *ex post facto* law within the prohibition of the federal constitution? . . .

The constitution of the United States, art. 1, s. 9, prohibits the legislature of the United States from passing any *ex post facto* law; and in sec. 10 lays several restrictions on the authority of

the legislatures of the several States; and among them, "that no State shall pass any ex post facto law."

It may be remembered that the legislatures of several of the States, to wit, Massachusetts, Pennsylvania, Delaware, Maryland, and North and South Carolina, are expressly prohibited, by their state constitutions, from passing any ex post facto law.

I shall endeavor to show what law is to be considered an ex post facto law, within the words and meaning of the prohibition in the federal constitution. The prohibition, "that no State shall pass any ex post facto law," necessarily requires some explanation; for naked and without explanation it is unintelligible, and means nothing. Literally it is only that a law shall not be passed concerning, and after the fact, or thing done, or action committed. I would ask, what fact; of what nature or kind; and by whom done? That Charles I, king of England, was beheaded; that Oliver Cromwell was protector of England; that Louis XVI, late king of France, was guillotined,—are all facts that have happened, but it would be nonsense to suppose that the States were prohibited from making any law after either of these events, and with reference thereto. The prohibition of the letter is not to pass any law concerning and after the fact, but the plain and obvious meaning and intention of the prohibition is this, that the legislatures of the several States shall not pass laws after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it. The prohibition, considered in this light, is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation. I do not think it was inserted to secure the citizen in his private rights, of either property or contracts. The prohibitions not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were inserted to secure private rights; but the restriction not to pass any ex post facto law, was to secure the person of the subject from injury or punishment, in consequence of such law. If the prohibition against making ex post facto laws was intended to secure personal rights from being affected or injured by such laws, and the prohibition is sufficiently extensive for that object, the other

restraints I have enumerated were unnecessary, and therefore improper, for both of them are retrospective.

I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender. All these and similar laws are manifestly unjust and oppressive. In my opinion, the true distinction is between *ex post facto* laws and retrospective laws. Every *ex post facto* law must necessarily be retrospective, but every retrospective law is not an *ex post facto* law; the former only are prohibited. Every law that takes away or impairs rights vested, agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule that a law should have no retrospect; but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion, or of pardon. They are certainly retrospective, and literally both concerning, and after, the facts committed. But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time, or to save time from the statute of limitations, or to excuse acts which were unlawful, and before committed, and the like, is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful, and the making an innocent action criminal, and punishing it as a crime. The expressions "*ex post facto* laws" are technical; they had been in use long before the Revolution, and had acquired an appropriate meaning by legislators, lawyers, and authors. The celebrated and

judicious Sir William Blackstone, in his Commentaries, considers an ex post facto law precisely in the same light I have done. His opinion is confirmed by his successor, Mr. Wooddeson, and by the author of the Federalist, whom I esteem superior to both, for his extensive and accurate knowledge of the true principles of government. . . .

In the present case, there is no fact done by Bull and wife, plaintiffs in error, that is in any manner affected by the law or resolution of Connecticut; it does not concern, or relate to, any act done by them. The decree of the court of probate of Hartford, on the 21st March, in consequence of which Calder and wife claim a right to the property in question, was given before the said law or resolution, and in that sense was affected and set aside by it; and in consequence of the law allowing a hearing and a decision in favor of the will, they have lost what they would have been entitled to, if the law or resolution, and the decision in consequence thereof, had not been made. The decree of the court of probate is the only fact on which the law or resolution operates. In my judgment the case of the plaintiffs in error is not within the letter of the prohibition; and, for the reasons assigned, I am clearly of opinion, that it is not within the intention of the prohibition; and if within the intention, but out of the letter, I should not, therefore consider myself justified to continue it within the prohibition, and therefore that the whole was void.

It was argued by the counsel for the plaintiffs in error, that the legislature of Connecticut had no constitutional power to make the resolution, or law, in question, granting a new hearing, &c.

Without giving an opinion, at this time, whether this court has jurisdiction to decide that any law made by congress, contrary to the constitution of the United States, is void, I am fully satisfied that this court has no jurisdiction to determine that any law of any state legislature, contrary to the constitution of such State is void. Further, if this court had such jurisdiction, yet it does not appear to me, that the resolution, or law, in question, is contrary to the charter of Connecticut, or its constitution, which is said by counsel to be composed of its charter, acts of assembly, and usages and customs. I should think that the courts of Connecticut are the proper tribunals to decide whether

laws contrary to the constitution thereof are void. In the present case they have, both in the inferior and superior courts, determined that the resolution, or law, in question, was not contrary to either their State or the federal constitution.

To show that the resolution was contrary to the constitution of the United States, it was contended that the words, *ex post facto* law, have a precise and accurate meaning, and convey but one idea to professional men, which is, "by matter of after fact; by something after the fact." And *Co. Litt.*, 241; *Fearne's Cont. Rem.* (old ed.), 175 and 203; *Powell on Devises*, 113, 133, 134, were cited; and the table to *Coke's Reports* (by *Wilson*), title *ex post facto*, was referred to. There is no doubt that a man may be a trespasser from the beginning, by matter of after fact; as where an entry is given by law, and the party abuses it; or where the law gives a distress, and the party kills, or works the distress.

I admit, an act unlawful in the beginning may, in some cases, become lawful by matter of after fact.

I also agree that the words "*ex post facto*" have the meaning contended for, and no other, in the cases cited, and in all similar cases where they are used unconnected with, and without relation to, legislative acts, or laws.

There appears to me a manifest distinction between the case where one fact relates to, and affects another fact, as where an after fact, by operation of law, makes a former fact either lawful or unlawful; and the case where a law made after a fact done, is to operate on, and to affect such fact. In the first case both the acts are done by private persons. In the second case the first act is done by a private person, and the second act is done by the legislature to affect the first act.

I believe that but one instance can be found in which a British judge called a statute that affected contracts made before the statute, an *ex post facto* law; but the judges of Great Britain always considered penal statutes, that created crimes, or increased the punishment of them, as *ex post facto* laws.

If the term *ex post facto* law is to be construed to include and to prohibit the enacting any law after a fact, it will greatly restrict the power of the federal and state legislatures; and the consequences of such a construction may not be foreseen.

If the prohibition to make no *ex post facto* law extends to all

laws made after the fact, the two prohibitions, not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were improper and unnecessary. . . .

It is not to be presumed that the federal or state legislatures will pass laws to deprive citizens of rights vested in them by existing laws; unless for the benefit of the whole community; and on making full satisfaction. The restraint against making any ex post facto laws was not considered, by the framers of the constitution, as extending to prohibit the depriving a citizen even of a vested right to property; or the provision, "that private property should not be taken for public use, without just compensation," was unnecessary.

It seems to me that the right of property, in its origin, could only arise from compact express, or implied, and I think it the better opinion, that the right, as well as the mode or manner of acquiring property, and of alienating or transferring, inheriting or transmitting it, is conferred by society, is regulated by civil institution, and is always subject to the rules prescribed by positive law. When I say that a right is vested in a citizen, I mean, that he has the power to do certain actions, or to possess certain things, according to the law of the land.

If any one has a right to property, such right is a perfect and exclusive right; but no one can have such right before he has acquired a better right to the property than any other person in the world; a right, therefore, only to recover property cannot be called a perfect and exclusive right. I cannot agree, that a right to property vested in Calder and wife, in consequence of the decree of the 21st of March, 1783, disapproving of the will of Morrison, the grandson. If the will was valid, Mrs. Calder could have no right, as heiress of Morrison, the physician; but if the will was set aside, she had an undoubted title.

The resolution, or law, alone had no manner of effect on any right whatever vested in Calder and wife. The resolution, or law, combined with the new hearing, and the decision in virtue of it, took away their right to recover the property in question. But when combined they took away no right of property vested in Calder and wife; because the decree against the will, 21st March, 1783, did not vest in or transfer any property to them.

I am under a necessity to give a construction, or explanation

of the words, "ex post facto," because they have not any certain meaning attached to them. But I will not go further than I feel myself bound to do; and if I ever exercise the jurisdiction, I will not decide any law to be void, but in a very clear case.

I am of the opinion that the decree of the supreme court of errors of Connecticut be affirmed, with costs.

[Justices PATERSON, FREDELL, and CUSHING delivered concurring opinions.]

CUMMINGS v. THE STATE OF MISSOURI.

4 Wallace, 277. (1866.)

Mr. Justice FIELD delivered the opinion of the court.

This case comes before us on a writ of error to the Supreme Court of Missouri, and involves a consideration of the test oath imposed by the Constitution of that State. The plaintiff in error is a priest of the Roman Catholic Church, and was indicted and convicted in one of the circuit courts of the State of the crime of teaching and preaching as a priest and minister of that religious denomination without having first taken the oath, and was sentenced to pay a fine of five hundred dollars, and to be committed to jail until the same was paid. On appeal to the Supreme Court of the State, the judgment was affirmed.

The oath prescribed by the constitution, divided into its separable parts, embraces more than thirty distinct affirmations or tests. Some of the acts against which it is directed, constitute offenses of the highest grade, to which, upon conviction, heavy penalties are attached. Some of the acts have never been classed as offenses in the laws of any State, and some of the acts, under many circumstances, would not even be blameworthy. It requires the affiant to deny not only that he has ever "been in armed hostility to the United States, or to the lawful authorities thereof," but, among other things, that he has ever, "by act or word," manifested his adherence to the cause of the enemies of the United States, foreign or domestic, or his desire for their triumph over the arms of the United States, or his sympathy with those engaged in rebellion, or has ever harbored or aided any person engaged in guerrilla warfare against the loyal in-

habitants of the United States, or has ever entered or left the State for the purpose of avoiding enrollment or draft in the military service of the United States; or, to escape the performance of duty in the militia of the United States, has ever indicated, in any terms, his disaffection to the United States in its contest with the Rebellion.

Every person who is unable to take this oath is declared incapable of holding, in the State, "any office of honor, trust or profits," etc. . . .

Fine and imprisonment are prescribed as a punishment for holding or exercising any of "the offices, positions, trusts, professions, or functions," specified without having taken the oath. . . .

The oath thus required is, for its severity, without any precedent that we can discover. In the first place it is retrospective; it embraces all the past from this day; and, if taken years hence, it will also cover all the intervening period. . . .

The disabilities created by the constitution of Missouri must be regarded as penalties—they constitute punishment. We do not agree with the counsel of Missouri that "to punish one is to deprive him of life, liberty or property, and that to take from him anything less than these is no punishment at all." The learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the cause of the deprivation determining this fact. . . .

The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined. . . .

Now, some of the acts to which the expurgatory oath is directed were not offenses at the time they were committed. It was no offense against any law to enter or leave the State of Missouri for the purpose of avoiding enrollment or draft in the military service of the United States, however much the evasion of such service might be the subject of moral censure. Clauses which prescribe a penalty for an act of this nature are within the terms of the definition of an *ex post facto* law—"they impose a punishment for an act not punishable at the time it was committed."

Some of the acts at which the oath is directed constituted high offenses at the time they were committed, to which, upon conviction, fine and imprisonment, or other heavy penalties, were attached. The clauses which provide a further penalty for these acts are also within the definition of an *ex post facto* law—"they impose additional punishment to that prescribed when the act was committed."

And this is not all. The clauses in question subvert the presumptions of innocence, and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way—by an inquisition, in the form of an expurgatory oath, into the consciences of the parties. . . .

The judgment of the Supreme Court of Missouri must be reversed, and the cause remanded, with directions to enter a judgment reversing the judgment of the Circuit Court, and directing that court to discharge the defendant from imprisonment, and suffer him to depart without delay.

And it is so ordered.

The Chief Justice, and Messrs. Justices SWAYNE, DAVIS, and MILLER dissented. . . .

CHAPTER IX.

LAWS IMPAIRING THE OBLIGATION OF CONTRACTS VOID.*

FLETCHER v. PECK.

6 Cranch, 87. Decided 1810.

Error to the circuit court of the United States for the district of Massachusetts, in an action of covenant brought by Fletcher against Peck. . . .

March 16, 1810. MARSHALL, C. J., delivered the opinion of the court as follows:

The pleadings being now amended, this cause comes on again to be heard on sundry demurrers, and on a special verdict.

This suit was instituted on several covenants contained in a deed made by John Peck, the defendant in error, conveying to Robert Fletcher, the plaintiff in error, certain lands which were part of a large purchase made by James Gunn and others, in the year 1795, from the State of Georgia, the contract for which was made in the form of a bill passed by the legislature of that State.

The first count in the declaration set forth a breach in the second covenant contained in the deed. The covenant is, "that the legislature of the State of Georgia, at the time of passing the act of sale aforesaid, had good right to sell and dispose of the same in manner pointed out by the said act." The breach assigned is, that the legislature had no power to sell.

The plea in bar sets forth the constitution of the State of Georgia, and avers that the lands sold by the defendant to the plaintiff, were within that State. It then sets forth the granting act, and avers the power of the legislature to sell and dispose of the premises as pointed out by the act.

To this plea the plaintiff below demurred, and the defendant joined in demurrer.

* See Sec. 172, Vol. 2, *Cyclopedia of Law*.

That the legislature of Georgia, unless restrained by its own constitution, possesses the power of disposing of the unappropriated lands within its own limits, in such manner as its own judgment shall dictate, is a proposition not to be controverted. The only question, then, presented by this demurrer, for the consideration of the court, is this, did the then constitution of the State of Georgia prohibit the legislature to dispose of the lands, which were the subject of this contract, in the manner stipulated by the contract?

The question whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

In this case the court can perceive no such opposition. In the constitution of Georgia, adopted in the year 1789, the court can perceive no restriction on the legislative power which inhibits the passage of the act of 1795. They cannot say that, in passing that act, the legislature has transcended its powers, and violated the constitution.

In overruling the demurrer, therefore, to the first plea, the circuit court committed no error.

The third covenant is, that all the title which the State of Georgia ever had in the premises had been legally conveyed to John Peck, the grantor.

The second count assigns, in substance, as a breach of this covenant, that the original grantees from the State of Georgia promised and assured divers members of the legislature, then sitting in general assembly, that if the said members would assent to, and vote for, the passing of the act, and if the said bill should pass, such members should have a share of, and be interested in, all the lands purchased from the said State by virtue of such law. And that divers of the said members, to whom the

said promises were made, were unduly influenced thereby, and, under such influence, did vote for the passing of the said bill; by reason whereof the said law was a nullity, etc., and so the title of the State of Georgia did not pass to the said Peck, etc.

The plea to this count, after protesting that the promises it alleges were not made, avers, that until after the purchase made from the original grantees by James Greenleaf, under whom the said Peck claims, neither the said James Greenleaf, nor the said Peck, nor any of the mesne vendors between the said Greenleaf and Peck, had any notice or knowledge that any such promises or assurances were made by the said original grantees, or either of them, to any of the members of the legislature of the State of Georgia.

To this plea the plaintiff demurred generally, and the defendant joined in the demurrer.

That corruption should find its way into the governments of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would, in any case, be competent, on proceedings instituted by the State itself, to vacate a contract thus formed, and to annul rights acquired under that contract, by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a State, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded, that an act of the supreme sovereign power might be declared null by a court in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?

If the majority of the legislature be corrupted, it may well be doubted whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated is not clearly discerned.

Whatever difficulties this subject might present, when viewed under aspects of which it may be susceptible, this court can perceive none in the particular pleadings now under consideration.

This is not a bill brought by the State of Georgia to annul the contract, nor does it appear to the court, by this count, that the State of Georgia is dissatisfied with the sale that has been made. The case, as made out in the pleadings, is simply this. One individual who holds lands in the State of Georgia, under a deed covenanting that the title of Georgia was in the grantor, brings an action of covenant upon this deed, and assigns, as a breach, that some of the members of the legislature were induced to vote in favor of the law which constituted the contract, by being promised an interest in it, and that therefore the act is a mere nullity.

This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a State. If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law.

The circuit court, therefore, did right in overruling this demurrer.

The fourth covenant in the deed is, that the title to the premises has been in no way constitutionally or legally impaired by virtue of any subsequent act of any subsequent legislature of the State of Georgia.

The third count recites the undue means practiced on certain members of the legislature, as stated in the second count, and

then alleges that, in consequence of these practices and of other causes, a subsequent legislature passed an act annulling and rescinding the law under which the conveyance to the original grantees was made, declaring that conveyance void, and asserting the title of the State to the lands it contained. The count proceeds to recite at large this rescinding act, and concludes with averring that, by reason of this act, the title of the said Peck in the premises was constitutionally and legally impaired, and rendered null and void.

After protesting as before that no such promises were made as stated in this count, the defendant again pleads that himself and the first purchaser under the original grantees, and all intermediate holders of the property, were purchasers without notice.

To this plea there is a demurrer and joinder.

The importance and the difficulty of the questions presented by these pleadings, are deeply felt by the court.

The lands in controversy vested absolutely in James Gunn and others, the original grantees, by the conveyance of the governor, made in pursuance of an act of assembly to which the legislature was fully competent. Being thus in full possession of the legal estate, they, for a valuable consideration, conveyed portions of the land to those who were willing to purchase. If the original transaction was infected with fraud, these purchasers did not participate in it, and had no notice of it. They were innocent. Yet the legislature of Georgia has involved them in the fate of the first parties to the transaction, and, if the act be valid, has annihilated their rights also.

The legislature of Georgia was a party to this transaction; and for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be considered as a mere act of power which must find its vindication in a train of reasoning not often heard in courts of justice.

But the real party, it is said, are the people, and when their agents are unfaithful, the acts of those agents cease to be obligatory.

It is, however, to be recollected that the people can act only by these agents, and that, while within the powers conferred on them, their acts must be considered as the acts of the people. If the agents be corrupt, others may be chosen, and if their

contracts be examinable, the common sentiment, as well as common usage of mankind, points out a mode by which this examination may be made, and their validity determined.

If the legislature of Georgia was not bound to submit its pretensions to those tribunals which are established for the security of property, and to decide on human rights, if it might claim to itself the power of judging in its own case, yet there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded.

If the legislature be its own judge in its own case, it would seem equitable that its decisions should be regulated by those rules which would have regulated the decision of a judicial tribunal. The question was, in its nature, a question of title, and the tribunal which decided it was either acting in the character of a court of justice, and performing a duty usually assigned to a court, or it was exerting a mere act of power in which it was controlled only by its own will.

If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded. Titles, which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law; he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if this principle be overturned.

A court of chancery, therefore, had a bill been brought to set aside the conveyance made to James Gunn and others, as being obtained by improper practices with the legislature, whatever might have been its decision as respected the original grantees, would have been bound, by its own rules, and by the clearest principles of equity, to leave unmolested those who were purchasers, without notice, for a valuable consideration

If the legislature felt itself absolved from those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts, its act is to be supported by its power alone, and the same power may divest any other individual of his lands, if it shall be the will of the legislature so to exert it.

It is not intended to speak with disrespect of the legislature of Georgia, or of its acts. Far from it. The question is a general question, and is treated as one. For although such powerful objections to a legislative grant, as are alleged against this, may not again exist, yet the principle, on which alone this rescinding act is to be supported, may be applied to every case to which it shall be the will of any legislature to apply it. The principle is this: that a legislature may, by its own act, divest the vested estate of any man whatever, for reasons which shall, by itself, be deemed sufficient.

In this case the legislature may have had ample proof that the original grant was obtained by practices which can never be too much reprobated, and which would have justified its abrogation so far as respected those to whom crime was imputable. But the grant, when issued, conveyed an estate in fee-simple to the grantee, clothed with all the solemnities which law can bestow. This estate was transferable; and those who purchased parts of it were not stained by that guilt which infected the original transaction. Their case is not distinguishable from the ordinary case of purchasers of a legal estate without knowledge of any secret fraud which might have led to the emanation of the original grant. According to the well-known course of equity, their rights could not be affected by such fraud. Their situation was the same, their title was the same, with that of every other member of the community who holds land by regular conveyances from the original patentee.

Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held?

The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.

The correctness of this principle, so far as respects general legislation, can never be controverted. But if an act be done

under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.

When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?

To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection.

It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated.

The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution. She is a part of a large empire; she is a member of the American Union; and that union has a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several States, which none claim a right to pass. The constitution of the United States declares that no State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.

Does the case now under consideration come within this prohibitory section of the constitution?

In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract?

A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected.

If, under a fair construction of the constitution, grants are comprehended under the term contracts, is a grant from the State excluded from the operation of the provision? Is the clause to be considered as inhibiting the State from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself?

The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the State are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.

Whatever respect might have been felt for the state sovereign-

ties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State.

No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.

In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligation of those contracts into which the State may enter?

The State legislatures can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate? The court can perceive no sufficient grounds for making that distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?

The argument in favor of presuming an intention to except a

case, not excepted by the words of the constitution, is susceptible of some illustration from a principle originally engrafted in that instrument, though no longer a part of it. The constitution, as passed, gave the courts of the United States jurisdiction in suits brought against individual States. A State, then, which violated its own contract, was suable in the courts of the United States for that violation. Would it have been a defense in such a suit to say that the State had passed a law absolving itself from the contract? It is scarcely to be conceived that such a defense could be set up. And yet, if a State is neither restrained by the general principles of our political institutions, nor by the words of the constitution, from impairing the obligation of its own contracts, such a defense would be a valid one. This feature is no longer found in the constitution; but it aids in the construction of those clauses with which it was originally associated.

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the State of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.

In overruling the demurrer to the 3d plea, therefore, there is no error. . . .

The question, whether the vacant lands within the United States became a joint property, or belonged to the separate States, was a momentous question, which, at one time, threatened to shake the American confederacy to its foundation. This important and dangerous contest has been compromised, and the compromise is not now to be disturbed.

It is the opinion of the court, that the particular land stated in the declaration appears from this special verdict, to lie within the State of Georgia, and that the State of Georgia had power to grant it.

Some difficulty was produced by the language of the covenant, and of the pleadings. It was doubted whether a State can be seized in fee of lands subject to the Indian title, and whether a

decision that they were seized in fee might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title.

The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seizin in fee on the part of the State.

Judgment affirmed, with costs.

[Mr. Justice JOHNSON delivered a separate opinion.]

STURGES v. CROWNSHIELD.

4 *Wheaton*, 122. (1819.)

[In this case suit was brought against the defendant as the maker of two promissory notes. They were both dated at New York, on 22d day of March, 1811, and the defendant pleaded his discharge under an act for the benefit of insolvent debtors and their creditors, passed by the legislature of New York subsequently to the date of the notes in controversy. The contracts claimed to be violated were made prior to the passage of the law, and the court held, for that reason, that this feature of the law was unconstitutional and void, as impairing the obligation of contracts within the meaning of the Constitution of the United States.]

MARSHALL, C. J., delivered the opinion of the court. . . .

We proceed to the great question on which the cause must depend. Does the law of New York, which is pleaded in this case, impair the obligation of contracts, within the meaning of the constitution of the United States? This act liberates the person of the debtor, and discharges him from all liability for any debt previously contracted, on his surrendering his property in the manner it prescribes. In discussing the question whether a State is prohibited from passing such a law as this, our first inquiry is into the meaning of words in common use. What is the obligation of a contract? and what will impair it?

It would seem difficult to substitute words which are more

intelligible, or less liable to misconstruction, than those which are to be explained. A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day; and this is its obligation. Any law which releases a part of this obligation, must in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid, and entirely discharges it.

The words of the constitution, then, are express, and incapable of being misunderstood. They admit of no variety of construction, and are acknowledged to apply to that species of contract, an engagement between man and man, for the payment of money, which has been entered into by these parties. Yet the opinion that this law is not within the prohibition of the constitution, has been entertained by those who are entitled to great respect, and has been supported by arguments which deserve to be seriously considered.

It has been contended, that as a contract can only bind a man to pay to the full extent of his property, it is an implied condition that he may be discharged on surrendering the whole of it.

But it is not true that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents, and integrity, constitute a fund which is as confidently trusted as property itself. Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation.

It is the opinion of the court, that the act of the State of New York, which is pleaded by the defendant in this cause, so far as it attempts to discharge this defendant from the debt in the declaration mentioned, is contrary to the constitution of the United States, and that the plea is no bar to the action. . . .

THE TRUSTEES OF DARTMOUTH COLLEGE v. WOODWARD.

4 Wheaton, 518. (1819.)

MARSHALL, C. J., delivered the opinion of the court, as follows:

This is an action of trover, brought by the Trustees of Dartmouth College against William H. Woodward, in the state court of New Hampshire for the book or records, corporate seal, and other corporate property, to which the plaintiffs allege themselves to be entitled.

A special verdict, after setting out the rights of the parties, finds for the defendant, if certain acts of the legislature of New Hampshire, passed on the 27th of June, and on the 18th of December, 1816, be valid, and binding on the trustees without their assent, and not repugnant to the constitution of the United States; otherwise it finds for the plaintiffs.

The superior court of judicature of New Hampshire rendered a judgment upon this verdict for the defendant, which judgment has been brought before this court by writ of error. The single question now to be considered is, do the acts to which the verdict refers violate the constitution of the United States?

. . .

The title of the plaintiffs originates in a charter dated the 13th day of December, in the year 1769, incorporating twelve persons therein mentioned, by the name of "The Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, who are to govern the college, to fill up all vacancies which may be created in their own body.

The defendant claims under three acts of the legislature of New Hampshire, the most material of which was passed on the 27th of June, 1816, and is entitled "An act to amend the charter and enlarge and improve the corporation of Dartmouth College." Among other alterations in the charter, this act increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the State, and creates a board of overseers, with power to inspect and control the most important acts of the trustees. This board

consists of twenty-five persons. The president of the senate, the speaker of the house of representatives of New Hampshire, and the governor and lieutenant-governor of Vermont, for the time being, are to be members *ex officio*. The board is to be completed by the governor and council of New Hampshire, who are also empowered to fill all vacancies which may occur. The acts of the 18th and 26th of December are supplemental to that of the 27th of June, and are principally intended to carry that act into effect.

The majority of the trustees of the college have refused to accept this amended charter, and have brought this suit for the corporate property, which is in possession of a person holding by virtue of the acts which have been stated.

It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application it is stated that large contributions have been made for the object, which will be conferred on the corporation as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found.

The points for consideration are,

1. Is this contract protected by the constitution of the United States?
2. Is it impaired by the acts under which the defendant holds?

[It was claimed that the funds of the college were public property, and the act of incorporation was a grant of political power. In regard to this the court said:]

It becomes then the duty of the court most seriously to examine this charter, and to ascertain its true character.

From the instrument itself it appears that about the year 1754 the Rev. Eleazer Wheelock established at his own expense, and on his own estate, a charity school for the instruction of Indians in the Christian religion. The success of this institution inspired him with the design of soliciting contributions in England for carrying on and extending his undertaking. In this pious work he employed the Rev. Nathaniel Whitaker, who, by virtue of a power of attorney from Dr. Wheelock, appointed

the Earl of Dartmouth and others trustees of the money which had been and should be contributed; which appointment Dr. Wheelock confirmed by a deed of trust authorizing the trustees to fix on a site for the college. They determined to establish the school on Connecticut River, in the western part of New Hampshire; that situation being supposed favorable for carrying on the original design among the Indians, and also for promoting learning among the English, and the proprietors in the neighborhood having made large offers of land on condition that the college should there be placed. Dr. Wheelock then applied to the crown for an act of incorporation, and represented the expediency of appointing those whom he had, by his last will, named as trustees in America, to be members of the proposed corporation. "In consideration of the premises," "for the education and instruction of the youth of the Indian tribes," etc., "and also of English youth and any others," the charter was granted, and the Trustees of Dartmouth College were by that name created a body corporate, with power, for the use of said college, to acquire real and personal property, and to pay the president, tutors, and other officers of the college such salaries as they shall allow.

The charter proceeds to appoint Eleazer Wheelock, "the founder of said college," president thereof, with power by his last will to appoint a successor, who is to continue in office until disapproved by the trustees. In cases of vacancy, the trustees may appoint a president, and in case of the ceasing of a president, the senior professor or tutor, being one of the trustees, shall exercise the office until an appointment shall be made. The trustees have power to appoint and displace professors, tutors, and other officers, and to supply any vacancies which may be created in their own body by death, resignation, removal, or disability; and also to make orders, ordinances, and laws for the government of the college, the same not being repugnant to the laws of Great Britain or of New Hampshire, and not excluding any person on account of his speculative sentiments in religion, or his being of a religious profession different from that of the trustees.

This charter was accepted, and the property, both real and personal, which had been contributed for the benefit of the college, was conveyed to and vested in the corporate body.

From this brief review of the most essential parts of the charter, it is apparent that the funds of the college consisted entirely of private donations. . . .

Whence, then, can be derived the idea that Dartmouth College has become a public institution, and its trustees public officers, exercising powers conferred by the public for public objects? Not from the source whence its funds were drawn, for its foundation is purely private and eleemosynary,—not from the application of those funds; for money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government. Is it from the act of incorporation? Let this subject be considered.

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities that corporations were invented and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power or a political character than immortality would confer such power or character on a natural person. It is no more a State instrument than a natural person exercising the same powers would be. If, then, a natural person, employed by individuals in the education of youth, or for the government of a seminary in which youth is educated, would not become a public officer, or be considered as a member

of the civil government, how is it that this artificial being, created by law for the purpose of being employed by the same individuals for the same purposes, should become a part of the civil government of the country?

From this review of the charter, it appears that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors to the specified objects of that bounty; that its trustees or governors were originally named by the founder, and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government; but a charity school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation.

✓ The opinion of the court, after mature deliberation is, that this is a contract, the obligation of which cannot be impaired without violating the constitution of the United States. This opinion appears to us to be equally supported by reason and by the former decisions of this court.

2. We next proceed to the inquiry whether its obligation has been impaired by those acts of the legislature of New Hampshire to which the special verdict refers.

From the review of this charter which has been taken it appears that the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies created in their own body, was vested in the trustees. On the part of the crown it was expressly stipulated that this corporation, thus constituted, should continue forever; and that the number of trustees should forever consist of twelve, and no more. By this contract the crown was bound, and could have made no violent alteration in its essential terms without impairing its obligation.

It results from this opinion, that the acts of the legislature of New Hampshire, which are stated in the special verdict found in this cause, are repugnant to the constitution of the United

States; and that the judgment on this special verdict ought to have been for the plaintiffs. The judgment of the state court must, therefore, be reversed.

[Justices WASHINGTON and STORY delivered concurring opinions. Justice JOHNSON concurred for the reasons stated by the Chief Justice; Justice LIVINGSTON concurred for the reasons stated by the Chief Justice and by Justices WASHINGTON and STORY. Justice DUVALL dissented.]

**THE PROPRIETORS OF THE CHARLES RIVER BRIDGE
v. THE PROPRIETORS OF THE WARREN
BRIDGE ET AL.**

11 Peters, 420. Decided 1837.

Error to the supreme judicial court of the commonwealth of Massachusetts. The material facts and the nature of the case appear in the opinion of the court. . . .

TANEY, C. J., delivered the opinion of the court.

The questions involved in this case are of the gravest character, and the court have given to them the most anxious and deliberate consideration. The value of the right claimed by the plaintiffs is large in amount; and many persons may no doubt be seriously affected in their pecuniary interests by any decisions which the court may pronounce; and the questions which have been raised as to the power of the several States, in relation to the corporations they have chartered, are pregnant with important consequences; not only to the individuals who are concerned in the corporate franchises, but to the communities in which they exist. The court are fully sensible that it is their duty, in exercising the high powers conferred on them by the constitution of the United States, to deal with these great and extensive interests with the utmost caution; guarding, as far as they have the power to do so, the rights of property, and at the same time carefully abstaining from any encroachment on the rights reserved to the States.

It appears, from the record, that in the year 1650, the legislature of Massachusetts granted to the president of Harvard

College "the liberty and power" to dispose of the ferry from Charlestown to Boston, by lease or otherwise, in the behalf and for the behoof of the college; and that, under that grant, the college continued to hold and keep the ferry by its lessees or agents, and to receive the profits of it, until 1785. In the last-mentioned year, a petition was presented to the legislature, by Thomas Russell and others, stating the inconvenience of the transportation by ferries, over Charles River, and the public advantages that would result from a bridge; and praying to be incorporated for the purpose of erecting a bridge in the place where the ferry between Boston and Charlestown was then kept. Pursuant to this petition, the legislature, on the 9th of March, 1785, passed an act incorporating a company, by the name of "The Proprietors of the Charles River Bridge," for the purposes mentioned in the petition. Under this charter the company were empowered to erect a bridge, in "the place where the ferry was then kept;" certain tolls were granted and the charter was limited to forty years, from the first opening of the bridge for passengers; and from the time the toll commenced, until the expiration of this term, the company were to pay two hundred pounds, annually, to Harvard College; and at the expiration of the forty years the bridge was to be the property of the commonwealth; "saving (as the law expresses it), to the said college or university, a reasonable annual compensation, for the annual income of the ferry, which they might have received had not the said bridge been erected."

The bridge was accordingly built, and was opened for passengers on the 17th of June, 1786. In 1792, the charter was extended to seventy years, from the opening of the bridge; and at the expiration of that time it was to belong to the commonwealth. The corporation have regularly paid to the college the annual sum of two hundred pounds, and have performed all of the duties imposed on them by the terms of their charter.

In 1828, the legislature of Massachusetts incorporated a company by the name of "The Proprietors of the Warren Bridge," for the purpose of erecting another bridge over Charles River. This bridge is only sixteen rods, at its commencement, on the Charlestown side, from the commencement of the bridge of the plaintiffs; and they are about fifty rods apart at their termination on the Boston side. The travelers who pass over either

bridge, proceed from Charlestown square, which receives the travel of many great public roads leading from the country; and the passengers and travellers who go to and from Boston used to pass over the Charles River Bridge, from and through this square, before the erection of the Warren Bridge.

The Warren Bridge, by the terms of its charter, was to be surrendered to the State, as soon as the expenses of the proprietors in building and supporting it should be reimbursed; but this period was not, in any event, to exceed six years from the time the company commenced receiving toll.

When the original bill in this case was filed, the Warren Bridge had not been built; and the bill was filed after the passage of the law, in order to obtain an injunction to prevent its erection, and for general relief. The bill, among other things, charged, as a ground for relief, that the act for the erection of the Warren Bridge impaired the obligation of the contract between the commonwealth and the proprietors of the Charles River Bridge; and was therefore repugnant to the constitution of the United States. Afterwards, a supplemental bill was filed, stating that the bridge had then been so far completed, that it had been opened for travel, and that divers persons had passed over, and thus avoided the payment of the toll, which would otherwise have been received by the plaintiffs. The answer to the supplemental bill admitted that the bridge had been so far completed that foot passengers could pass; but denied that any persons but the workmen and the superintendents had passed over with their consent. In this state of the pleadings, the cause came on for hearing in the supreme judicial court for the county of Suffolk, in the commonwealth of Massachusetts, at November term, 1829; and the court decided that the act incorporating the Warren Bridge did not impair the obligation of the contract with the proprietors of the Charles River Bridge, and dismissed the complainants' bill: and the case is brought here by writ of error from that decision. It is, however, proper to state, that it is understood that the state court was equally divided upon the question; and that the decree dismissing the bill upon the ground above stated, was pronounced by a majority of the court, for the purpose of enabling the complainants to bring the question for decision before this court. . . .

The plaintiffs in error insist, mainly, upon two grounds:

1. That by virtue of the grant of 1650, Harvard College was entitled, in perpetuity, to the right of keeping a ferry between Charlestown and Boston; that this right was exclusive; and that the legislature had not the power to establish another ferry on the same line of travel, because it would infringe the rights of the college; and that these rights, upon the erection of the bridge in the place of the ferry, under the charter of 1785, were transferred to, and became vested in "the proprietors of the Charles River Bridge;" and that under, and by virtue of this transfer of the ferry right, the rights of the bridge company were as exclusive in that line of travel, as the rights of the ferry.
2. That independently of the ferry right, the acts of the legislature of Massachusetts of 1785 and 1792, by their true construction, necessarily implied that the legislature would not authorize another bridge, and especially a free one, by the side of this, and placed in the same line of travel, whereby the franchise granted to the "proprietors of the Charles River Bridge" should be rendered of no value; and the plaintiffs in error contend, that the grant of the ferry to the college, and of the charter to the proprietors of the bridge, are both contracts on the part of the State; and that the law authorizing the erection of the Warren Bridge in 1828 impairs the obligation of one or both of these contracts.

It is very clear, that in the form in which this case comes before us, being a writ of error to a state court, the plaintiffs, in claiming under either of these rights, must place themselves on the ground of contract, and cannot support themselves upon the principle that the law divests vested rights. It is well settled by the decisions of this court, that a state law may be retrospective in its character, and may divest vested rights, and yet not violate the constitution of the United States, unless it also impairs the obligation of a contract. In *2 Peters, 413, Satterlee v. Matthewson*, this court, in speaking of the state law then before them, and interpreting the article in the constitution of the United States which forbids the States to pass laws impairing the obligation of contracts, uses the following language: "It (the state law) is said to be retrospective; be it so. But retrospective laws which do not impair the obligation of contracts, or partake of the character of *ex post facto* laws, are

not condemned or forbidden by any part of that instrument" (the constitution of the United States). And in another passage in the same case, the court say: "The objection, however, most pressed upon the court, and relied upon by the counsel for the plaintiff in error, was, that the effect of this act was to divest rights which were vested by law in Satterlee. There is certainly no part of the constitution of the United States which applies to a state law of this description; nor are we aware of any decision of this, or of any circuit court, which has condemned such a law upon this ground, provided its effect be not to impair the obligation of a contract." The same principles were reaffirmed in this court, in the late case of *Watson and others v. Mercer*, decided in 1834, 8 Pet. 110: "As to the first point (say the court), it is clear that this court has no right to pronounce an act of the state legislature void as contrary to the constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The constitution of the United States does not prohibit the States from passing retrospective laws generally, but only *ex post facto* laws."

Neither can the extent of the pre-existing ferry right, whatever it may have been, have any influence upon the construction of the written charter for the bridge. It does not, by any means, follow, that because the legislative power in Massachusetts, in 1650, may have granted to a justly favored seminary of learning the exclusive right of ferry between Boston and Charlestown, they would, in 1785, give the same extensive privilege to another corporation, who were about to erect a bridge in the same place. The fact that such a right was granted to the college cannot, by any sound rule of construction, be used to extend the privileges of the bridge company beyond what the words of the charter naturally and legally import. Increased population longer experienced in legislation, the different character of the corporation which owned the ferry from that which owned the bridge, might well have induced a change in the policy of the State in this respect; and as the franchise of the ferry, and that of the bridge, are different in their nature, and were each established by separate grants, which have no words to connect the privileges of the one with the privileges of the other, there is no rule of legal interpretation which would authorize the court

to associate these grants together, and to infer that any privilege was intended to be given to the bridge company, merely because it had been conferred on the ferry. The charter to the bridge is a written instrument which must speak for itself, and be interpreted by its own terms.

This brings us to the act of the legislature of Massachusetts, of 1785, by which the plaintiffs were incorporated by the name of "The Proprietors of the Charles River Bridge;" and it is here, and in the law of 1792, prolonging their charter, that we must look for the extent and nature of the franchise conferred upon the plaintiffs.

Much has been said in the argument of the principles of construction by which this law is to be expounded, and what undertakings, on the part of the State, may be implied. The court think there can be no serious difficulty on that head. It is the grant of certain franchises by the public to a private corporation, and in a matter where the public interest is concerned. The rule of construction in such cases is well settled, both in England and by the decisions of our own tribunals. In 2 Barn. & Adol., 793, in the case of the proprietors of the Stourbridge Canal v. Wheeley and others, the court say, "The canal having been made under an act of parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction, in all such cases, is now fully established to be this; that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act." And the doctrine thus laid down is abundantly sustained by the authorities referred to in this decision. The case itself was as strong a one as could well be imagined for giving to the canal company, by implication, a right to the tolls they demanded. Their canal had been used by the defendants, to a very considerable extent, in transporting large quantities of coal. The rights of all persons to navigate the canal were expressly secured by the act of parliament; so that the company could not prevent them from using it, and the toll demanded was admitted to be reasonable. Yet, as they only used one of the levels of the canal, and did not pass through the locks; and the statute, in

giving the right to exact toll, had given it for articles which passed "through any one or more of the locks," and had said nothing as to toll for navigating one of the levels; the court held that the right to demand toll, in the latter case, could not be implied, and that the company were not entitled to recover it. This was a fair case for an equitable construction of the act of incorporation, and for an implied grant; if such a rule of construction could ever be permitted in a law of that description. For the canal had been made at the expense of the company; the defendants had availed themselves of the fruits of their labors, and used the canal freely and extensively for their own profit. Still the right to exact toll could not be implied, because such a privilege was not found in the charter.

Borrowing, as we have done, our system of jurisprudence from the English law; and having adopted, in every other case, civil and criminal, its rules for the construction of statutes; is there anything in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle where corporations are concerned? Are we to apply to acts of incorporation a rule of construction differing from that of the English law, and, by implication, make the terms of a charter in one of the States, more unfavorable to the public, than upon an act of parliament, framed in the same words, would be sanctioned in an English court? Can any good reason be assigned for excepting this particular class of cases from the operation of the general principle, and for introducing a new and adverse rule of construction in favor of corporations, while we adopt and adhere to the rules of construction known to the English common law, in every other case, without exception? We think not; and it would present a singular spectacle, if, while the courts in England are restraining, within the strictest limits, the spirit of monopoly, and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter, the courts of this country should be found enlarging these privileges by implication; and construing a statute more unfavorably to the public, and to the rights of the community, than would be done in a like case in an English court of justice.

But we are not now left to determine, for the first time, the rules by which the public grants are to be construed in this

country. The subject has already been considered in this court; and the rule of construction, above stated, fully established.

Adopting the rule of construction above stated as the settled one, we proceed to apply it to the charter of 1785 to the proprietors of the Charles River Bridge. This act of incorporation is in the usual form, and the privileges such as are commonly given to corporations of that kind. It confers on them the ordinary faculties of a corporation, for the purpose of building the bridge; and establishes certain rates of toll, which the company are authorized to take. This is the whole grant. There is no exclusive privilege given to them over the waters of Charles River above or below their bridge. No right to erect another bridge themselves, nor to prevent other persons from erecting one. No engagement from the State that another shall not be erected; and no undertaking not to sanction competition, nor to make improvements that may diminish the amount of its income. Upon all these subjects the charter is silent; and nothing is said in it about a line of travel, so much insisted on in the argument, in which they are to have exclusive privileges. No words are used from which an intention to grant any of these rights can be inferred. If the plaintiff is entitled to them, it must be implied, simply from the nature of the grant, and cannot be inferred from the words by which the grant is made.

The relative position of the Warren Bridge has already been described. It does not interrupt the passage over the Charles River Bridge, nor make the way to it or from it less convenient. None of the faculties or franchises granted to that corporation have been revoked by the legislature; and its right to take the tolls granted by the charter remains unaltered. In short, all the franchises and rights of property enumerated in the charter, and there mentioned to have been granted to it remain unimpaired. But its income is destroyed by the Warren Bridge; which, being free, draws off the passengers and property which would have gone over it, and renders their franchise of no value. This is the gist of the complaint. For it is not pretended that the erection of the Warren Bridge would have done them any injury, or in any degree affected their right of property, if it had not diminished the amount of their tolls. In order then to entitle themselves to relief, it is necessary to show that the leg-

islature contracted not to do the act of which they complain; and that they impaired or, in other words, violated that contract by the erection of the Warren Bridge.

The inquiry then is, does the charter contain such a contract on the part of the State? Is there any such stipulation to be found in that instrument? It must be admitted on all hands, that there is none,—no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must be by implication, and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the question. In charters of this description, no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words which import such a contract as the plaintiffs in error contend for, and none can be implied; and the same answer must be given to them that was given by this court to the Providence Bank. The whole community are interested in this inquiry, and they have a right to require that the power of promoting their comfort and convenience, and of advancing the public prosperity by providing safe, convenient, and cheap ways for the transportation of produce and the purposes of travel, shall not be construed to have been surrendered or diminished by the State, unless it shall appear by plain words that it was intended to be done.

The judgment of the supreme judicial court of the commonwealth of Massachusetts, dismissing the plaintiffs' bill, must, therefore, be affirmed, with costs.

[Mr. Justice McLEAN delivered an opinion in which he argued that the case should be dismissed for want of jurisdiction. Mr. Justice STORY delivered a dissenting opinion, in which Mr. Justice THOMPSON concurred.]

CHAPTER X.

THE BILL OF RIGHTS (AMENDMENTS) GUARANTEEING CIVIL AND POLITICAL RIGHTS.*

BARRON v. BALTIMORE.

7 Pet. 243; 10 Curtis' Decisions, 464. 1833.

Error to the court of appeals of the western shore of the State of Maryland.

Case by the plaintiff in error against the city of Baltimore to recover damages for injuries to the wharf property of the plaintiff, arising from the acts of the corporation.

The city, in the asserted exercise of its corporated authority over the harbor, the paving of streets, and regulating grades for paving, and over the health of Baltimore, diverted from their accustomed and natural course, certain streams of water, which flow from the range of hills bordering the city, and diverted them, so that they made deposits of sand and gravel near the plaintiff's wharf and thereby rendered the water shallow and prevented the access of vessels. The decision of Baltimore County Court was against the defendant, and a verdict for \$4,500 was rendered for the plaintiff. The court of appeals reversed the judgment of Baltimore county court and did not remand the case to that court for a further trial. From this judgment the defendant in the court of appeals prosecuted a writ of error to this court. Mayer, for the plaintiff.

Taney and Scott, *contra*, were stopped by the court.

MARSHALL, C. J., delivered the opinion of the court.

The judgment brought up by this writ of error having been rendered by the court of a State, this tribunal can exercise no jurisdiction over it, unless it be shown to come within the provisions of the 25th section of the judicial act, 1 Stats. at Large, 85.

The plaintiff in error contends that it comes within that clause

* See Secs. 201 to 213, Vol. 2, Cyclopedia of Law.

in the 5th amendment to the constitution, which inhibits the taking of private property for public use without just compensation. He insists that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a State as well as that of United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

The question thus presented is, we think, of great importance, but not of much difficulty.

The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as is supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by themselves; and the limitations on power, if express in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the 5th amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested. Such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.

The counsel for the plaintiff in error insists that the Constitution was intended to secure the people of the several states against the undue exercise of power by their respective state governments; as well as against that which might be attempted by their general government. In support of this argument he relies on the inhibitions contained in the 10th section of the 1st article.

We think that section affords a strong if not a conclusive

argument in support of the opinion already indicated by the court.

The preceding section contains restrictions which are obviously intended for the exclusive purpose of restraining the exercise of power by the departments of the general government. Some of them use language applicable only to Congress; others are expressed in general terms. The third clause, for example, declares that "no bill of attainment or *ex post facto* laws shall be passed." No language can be more general; yet the demonstration is complete that it applies solely to the government of the United States. In addition to the general arguments furnished by the instrument itself, some of which have already been suggested, the succeeding section, the avowed purpose of which is to restrain state legislation, contains in terms the very prohibition. It declares that "no State shall pass any bill of attainder or *ex post facto* law." This provision, then, of the ninth section, however comprehensive in language, contains no restriction on state legislature.

The ninth section having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the general government the tenth proceeds to enumerate those which were to operate on the state legislature. These restrictions are brought together in the same section, and are by expressed words applied to the states. "No State shall enter into any treaty," etc. Perceiving that in a constitution framed by the people of the United States for the government of all, no limitation of the action of the government on the people would apply to the state government, unless expressed in terms; the restrictions contained in the tenth section, are in direct words so applied to the states.

It is worthy of remark, too, that these inhibitions generally restrain the state legislature on subjects intrusted to the general government or in which the people of all the states feel an interest.

A State is forbidden to enter into any treaty, alliance, or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power, which is conferred entirely on the general government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the Constitution. To grant letters of

marque and reprisal, would lead directly to war; the power of declaring which is expressly given to Congress. To coin money is also the exercise of a power conferred on Congress. It would be tedious to recapitulate these several limitations on the powers of the States which are contained in this section. They will be found generally, to restrain State legislations on subjects entrusted to the government of the Union, in which the citizens of all the states are interested. In these alone were the whole people concerned. The question of application to States is not left to construction. It is averred in positive words.

If the original Constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discriminations between the limitations it imposes on the power of the general government, and on those of the States; if in every inhibition intended to act on State power, words are employed which directly express that intent,—some strong reason must be assigned for departing from this safe and judicious course in framing the amendments before that departure can be assumed.

We search in vain for that reason.

Had the people of the several States, or in any of them, required changes in their Constitution; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments; the remedy was in their own hands and would have been applied by themselves. A convention would have been assembled by the discontented State, and the required improvements would have been made by itself. The unwieldy and cumbrous machinery of procuring the recommendation from two-thirds of Congress and the assent of three-fourths of their sister States, could never have occurred to any human being as a mode of doing that which might be affected by the State itself. Had the framers of these amendments intended them to be limitations of the powers of the State governments, they would have imitated the framers of the original Constitution, and had expressed that intention. Had Congress engaged in the extraordinary occupation of improving the Constitution of the several States, by affording the people additional protection from the exercise of power by their own governments the matters which concerned themselves alone,

they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day, that the great Revolution which established the Constitution of the United States was not affected by immense opposition. Serious fears were extensively entertained that those powers which the patriotic statesmen, who then watched over the interests of the country, deemed essential to union, and the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention, by which the Constitution was adopted, amendments to guard against the abuse of power were commended. These amendments demanded security against the apprehended encroachments of the general governments, not against those of the local government.

In compliance with the sentiment thus generally expressed to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the States. These amendments contain no expression indicating an intention to apply them to the State government. This court cannot so apply them. We are of the opinion that the provision in the fifth amendment to the Constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the States. We are therefore, of opinion that there is no repugnancy between the several Acts of the General Assembly of Maryland, given in evidence by the defendants at the trial of this cause, in the court of that State, and the Constitution of the United States. This court, therefore, has no jurisdiction of the cause; and it is dismissed.

HAWAII v. MANKICHI. 4*190 U. S. 197. Decided June 1, 1903.*

Appeal from the District Court of the United States for the Territory of Hawaii.

This was a petition by Mankichi for a writ of *habeas corpus* to obtain his release from the Oahu convict prison, where he is confined upon conviction for manslaughter in alleged violation of the Constitution, in that he was tried upon an indictment not found by a grand jury, and convicted by the verdict of nine out of twelve jurors, the other three dissenting from the verdict.

Following the usual course of procedure in the Republic of Hawaii, prior to its incorporation as a Territory of the United States, the prisoner was tried upon an indictment much in the form of an information at common law, by the Attorney General, and endorsed "a true bill found this fourth day of May, A. D., 1899. A. Perry, first judge of the Circuit Court," etc.

From an order of the United States District Court discharging the prisoner the Attorney General of the Territory appealed to this court. . . .

Mr. Justice BROWN, after making the foregoing statement, delivered the opinion of the court.

The question involved in this case is an extremely simple one. The difficulty is in fixing upon the principles applicable to its solution. By a joint resolution adopted by Congress, July 7th, 1898, 30 Stat., 750, known as the Newlands resolution, and with the consent of the Republic of Hawaii, signified in the manner provided in its constitution, the Hawaiian Islands, and their dependencies, were annexed "as a part of the territory of the United States, and subject to the sovereign dominion thereof," with the following condition: "The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution *nor contrary to the Constitution of the United States*, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." The material parts of this resolution are

printed in the margin.* Though the resolution was passed July 7, the formal transfer was not made until August 12, when, at noon of that day, the American flag was raised over the government house, and the islands ceded with appropriate ceremonies to a representative of the United States. Under the conditions named in this resolution the Hawaiian Islands remained under the name of the "Republic of Hawaii" until June 14, 1900, when they were formally incorporated by act of Congress under the name of "Territory of Hawaii." 3 Stat., 141. By this act the Constitution was formally extended to these islands, sec. 5, and special provisions made for empanelling

* Joint resolution to provide for annexing the Hawaiian Islands to the United States. 30 Stat. 750.

WHEREAS, The government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands, and their dependencies and also to cede and transfer to the United States the absolute fee and ownership of all public, government or crown heads, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining. Therefore,

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States, and are subject to the sovereign dominion thereof, and that all and singular the property and rights thereinbefore mentioned are vested in the United States of America.

Until Congress shall provide for the government of such islands all the civil, judicial and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.

The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist or may hereafter be concluded, between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution or contrary to the Constitution of the United States nor to any existing treaty of the

grand juries, and for unanimous verdicts of petty juries. Sec. 83.

The question is whether, in continuing the municipal legislation of the islands not contrary to the Constitution of the United States, it was intended to abolish at once the criminal procedure theretofore in force upon the islands, and to substitute immediately and without new legislation the common law proceedings by grant and petit jury, which had been held applicable to other organized Territories, *Webster v. Reid*, 11 How., 437; *Thompson v. Utah*, 170 U. S., 343, though we have also held that the States, when once admitted as such, may dispense with grand juries, *Hurtado v. California*, 110 U. S., 516; and perhaps allow verdicts to be rendered by less than a unanimous vote. *American Publishing Co. v. Fisher*, 166 U. S., 464, *Thompson v. Utah*, 170 U. S., 343.

In fixing upon the proper construction to be given to this resolution, it is important to bear in mind the history and condition of the islands prior to their annexation by Congress. Since 1847 they had enjoyed the blessing of a civilized government, and a system of jurisprudence modelled largely upon the common law of England and the United States. Though lying in the tropical zone, the salubrity of their climate and the fertility of their soil had attracted thither large numbers of people from Europe and America, who brought with them political ideas and traditions which, about sixty years ago, found expres-

United States, shall remain in force until the Congress of the United States shall otherwise determine.

Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands the existing relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.

There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States, and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper.

sion in the adoption of a code of laws appropriate to their new conditions. Churches were founded, schools opened, courts of justice established, and civil and criminal laws administered upon substantially the same principles which prevailed in the two countries from which most of the immigrants had come. Taking the lead, however, in a change that has since been adopted by several of the United States, no provision was made for grand juries and criminals were prosecuted upon indictments found by judges. By a law passed in 1847, the number of a jury was fixed at twelve, but a verdict might be rendered upon the agreement of nine jurors. The question involved in this case is whether it was intended that this practice shall be instantly changed, and the criminal procedure embodied in the Fifth and Sixth Amendment to the Constitutions be adopted as of August 12, 1898, when the Hawaiian flag was hauled down and the American flag hoisted in its place.

If the words of the Newlands resolution, adopting the municipal legislation of Hawaii *not contrary to the Constitution of the United States*, be literally applied, the petitioner is entitled to his discharge, since that instrument expressly required, Amendment 5, that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury;" and, Amendment 6, that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." But there is another question underlying this and all other rules for the interpretation of statutes, and that is, what was the intention of the legislative body? Without going back to the famous case of the drawing of blood in the streets of Bologna, the books are full of authorities to the effect that the intention of the lawmaking power will prevail, even against the letter of the statute, or, as tersely expressed by Mr. Justice Swayne in *Smythe v. Fiske*, 23 Wall., 374, 380; "A thing may be within the letter of a statute and not within its meaning, and within its meaning and not within its letter. The intention of the lawmaker is the law." A parallel expression is found in the opinion of Mr. Chief Justice Thompson of the Supreme Court of the State of New York (subsequently Mr. Justice Thompson of this court), in *People v. Utica Ins. Co.*, 15 Johns., 358, 381;

"A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute, is not within the statute, unless it be within the intention of the makers."

Without going farther, numerous illustrations of this maxim are found in the reports of our own court. Nowhere is the doctrine more broadly stated than in *United States v. Kirby*, 7 Wall., 482, in which an act of Congress, providing for the punishment of any person who "shall knowingly and wilfully obstruct or retard the passage of the mail or any driver or carrier," was held not to apply to a state officer who had a warrant of arrest against a carrier for murder, the court observing that no officer of the United States was placed by his position above responsibility to the legal tribunals of the country, and to the ordinary process for his arrest and detention when accused of felony. "All laws," said the court, "should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exception to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter." A case was cited from Plowden, holding that a statute, which punished a prisoner as a felon who broke prison, did not extend to a prisoner who broke out when the prison was on fire, "for he is not to be hanged because he would not stay to be burned." Similar language to that in Kirby's case was used in *Carlisle v. United States*, 16 Wall., 147, 153.

In *Atkins v. Disintegrating Co.*, 18 Wall., 272, it was held that a suit in personam in admiralty was not a "civil suit" within the eleventh section of the judiciary act, though clearly a civil suit in the general sense of that phrase, and as used in other sections of the same act. See also *In re Louisville Underwriters*, 134 U. S., 488. So in *Heydenfeldt v. Davey Gold & Co.*, 93 U. S., 634, 638, it was said by Mr. Justice Davis: "If a liberal interpretation of any part of it (a statute) would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning when

expressions in it are rendered ambiguous by their connection with other clause, than by considering the necessity for it, and the causes which induced its enactment." To the same effect are the *Church of the Holy Trinity v. United States*, 143 U. S., 457, in which many cases are cited and reviewed, and *Lau Ow Bew v. United States*, 144 U. S., 47, 59. In this latter case it was held that a statute requiring the permission of the Chinese government, and the identification of "every Chinese person other than a laborer, who may be entitled by treaty or act of Congress to come within the United States," did not apply to "Chinese merchants already domiciled in the United States, who, having left the country for temporary purposes *animo revertendi* seek to re-enter it on their return to their business and their homes." Said the Chief Justice: "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion."

Two recent English cases are instructive in this connection. In *Plumstead Board of Works v. Spackman*, L. R. 13 Q. B. D., 878, 887, it was said by the Master of Rolls, afterwards Lord Esher: "If there are no means of avoiding such an interpretation of the statute," (as will amount to a great hardship) "a judge must come to the conclusion that the legislature by inadvertence has committed an act of legislative injustice; but to my mind a judge ought to struggle with all the intellect that he has, and with all the vigor of mind that he has, against such an interpretation of an act of Parliament; and, unless he is forced to come to a contrary conclusion, he ought to assume that it is impossible that the legislature could have so intended." See also *Ex parte Walton*, L. R. 17 Ch. D. 746.

Is there any room for construction in this case, or, are the words of the resolution so plain that construction is impossible? There are many reasons which induce us to hold that the act was not intended to interfere with the existing practice when such interference would result in imperiling the peace and good order of the islands. The main objects of the resolution were, 1st, to accept the cession of the islands theretofore made by the Republic of Hawaii, and to annex the same "as part of the territory of the United States, and subject to the sovereign dominion thereof;" 2d, to abolish all existing treaties with

various nations and to recognize only between the United States and such foreign nations; 3d, to continue the existing laws and customs regulations, so far as they were not inconsistent with the resolution or contrary to the Constitution until Congress should otherwise determine. From the terms of this resolution it is evident that it was intended to be merely temporary and provisional; that no change in the government was contemplated, and that until further legislation the Republic of Hawaii continued in existence. Even its name was not changed until 1900, when the "Territory of Hawaii" was organized. The laws of the United States were not extended over the islands until the organic act was passed on April 30, 1900, when, so careful was Congress not to disturb the existing condition of things any further than was necessary, it was provided, sec. 5, that only "the laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said territory as elsewhere in the United States." There was apparently some discretion left to the courts in this connection. *Indianapolis, etc., R. R. Co. v. Horst*, 95 U. S., 291, 297. The fact already mentioned that Congress in this organic act inserted a provision for the empanelling of grand juries and for the unanimity of verdicts indicates an understanding that the previous practice had been pursued up to that time and that a change in the existing law was contemplated.

Of course, under the Newlands resolution, any new legislation must conform to the Constitution of the United States, but how far the exceptions to the existing municipal legislation were intended to abolish existing laws, must depend somewhat upon circumstances. Where the immediate application of the Constitution required no new legislation to take the place of that which the Constitution abolished, it may be well held to have taken immediate effect; but where the application of a procedure hereto well known and acquiesced in, left nothing to take its place, without new legislation, the result might be so disastrous that we might well say that it could not have been within the contemplation of Congress. In all probability the contingency which has actually arisen occurred to no one at the time. If it had, and its consequences were foreseen, it is incredible that Congress should not have provided against it."

If the negative words of the resolution "not contrary to the

Constitution of the United States," be construed as imposing upon the islands every provision of a Constitution, which must have been unfamiliar to a large number of their inhabitants, and for which no previous preparation had been made, the consequences in this particular connection would be that every criminal in the Hawaiian Islands convicted of an infamous offense, between August 12, 1898, and June 14, 1900, when the act organizing the territorial government took effect, must be set at large; and every verdict in a civil case rendered by less than a unanimous jury held for naught. Surely such a result could not have been within the contemplation of Congress. It is equally manifest that such could not have been the intention of the Republic of Hawaii in surrendering its autonomy. Until then it was an independent nation, exercising all the powers and prerogatives of complete sovereignty. It certainly could not have anticipated that, in dealing with another independent nation and yielding up its sovereignty, it had denuded itself, by a negative pregnant, of all power of enforcing its criminal laws according to the methods which have been in vogue for sixty years, and was adopting a new procedure for which it had had no opportunity for making preparation. The legislature of the republic had just adjourned, not to convene again until some time in 1900, and not actually convening until 1901. The resolution on its face bears evidence of having been intended merely for a temporary purpose, and to give time to the republic to adapt itself to such form of territorial government as should afterwards be adopted in its organic act.

The language of Mr. Buchanan, then Secretary of State, in holding that the military government established in California did not cease to exist with the treaty of peace, but continued as a government *de facto* until Congress should provide a territorial government, is peculiarly applicable to this case. "The great law of necessity justifies this conclusion. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate an existing government when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest." 16 How. 184.

It is insisted, however, that as a common law of England

had been adopted by Hawaii by the code of 1897, it was within the power of the courts to summon a grand jury, and that such action might have been taken and criminals tried upon indictments properly found, and convicted by unanimous verdict. The suggestion is rather fanciful than real, since section 1109 of the Code of 1897, adopting the common law of England, contained a proviso, that "no persons shall be subject to criminal proceedings except as provided by the Hawaiian laws." These laws provided expressly, sec. 616, Penal Laws of 1897 as follows: "The necessary bills of indictment shall be duly prepared by a legal prosecuting officer, and be duly presented to the presiding judge of the court before the arraignment of the accused, and such judge shall, after examination, certify upon each bill of indictment whether he finds the same a true bill or not." The question thus squarely presented to every judge in the republic, was, whether he was bound to summon a grand jury under the Newlands resolution, when no provision existed by law for empaneling the same or their payment, and when in so doing he was obliged to ignore the plain statute of his own country.

It is not intended here to decide that the words "nor contrary to the Constitution of the United States" are meaningless. Clearly they would be operative upon any municipal legislation thereafter adopted, and upon any proceedings thereafter had, when the application of the Constitution would not result in the destruction of existing provisions conducive to the peace and good order of the community. Therefore we should answer without hesitation in the negative the question put by the counsel for the petitioner in their brief: "Would municipal statutes of Hawaii, allowing a conviction of treason on circumstantial evidence, or on the testimony of one witness, depriving a person of liberty by the will of the legislature and without process, or confiscating private property for public use without compensation, remain in force after an annexation of the territory to the United States, which was conditioned upon the extinction of all legislation contrary to the Constitution?" We would even go farther and say that most, if not all, the privileges and immunities contained in the bill of rights in the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground

that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the condition of the Islands, and well calculated to conserve the rights of their citizens to their lives, their property and their well being.

Inasmuch as we are of opinion that the *status* of the islands and the powers of their provisional government were measured by their Newlands Resolution, and the case has been argued upon that theory, we have not deemed it necessary to consider what would have been its position had the important words, "nor contrary to the Constitution of the United States" been omitted, or to reconsider the questions which arose in the Insular Tariff Cases regarding the power of Congress to annex territory without at the same time extending the Constitution over it. Of course, for the reasons already stated, the questions involved in this case could arise only from such as occur between the taking effect of the joint resolution of July 7, 1898, and the Act of April 30, 1900, establishing the territorial government.

The decree of the district court for the territory of Hawaii must be reversed, and the case remanded to that court with instructions to dismiss the petition.

[Mr. Justice WHITE and Mr. Justice McKENNA gave a concurring opinion. C. H. J. FULLER, HARLAN, BREWER and PECKHAN, Justices, dissented.]

CIVIL RIGHTS CASES.

UNITED STATES v. STANLEY. UNITED STATES v.
RYAN. UNITED STATES v. NICHOLS. UNITED
STATES v. SINGLETON. ROBINSON AND
WIFE v. MEMPHIS AND CHARLESTON
RAILROAD COMPANY.

109 U. S. 3. 1883.

These cases are all founded on the first and second sections of the Act of Congress, known as the Civil Rights Act, passed March 1st, 1875, entitled "An Act to protect all citizens in their civil

and legal rights." 18 Stat., 335. Two of the cases, those against Stanley and Nichols, were indictments for denying to persons of color the accommodations and privileges of an inn or hotel; two of them, those against Ryan and Singleton, were, one an information, the other an indictment, for denying to individuals the privileges and accommodations of a theater, the information against Ryan being for refusing a colored person a seat in the dress circle of Maguire's theatre in San Francisco; and the indictment against Singleton was for denying to another person, whose color was not stated, the full enjoyment of the accommodations of the theatre known as the Grand Opera House in New York, "said denial not being made for any reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude." The case of Robinson and wife against the Memphis & Charleston R. R. Company was an action brought in the Circuit Court of the United States for the Western District of Tennessee, to recover the penalty of five hundred dollars given by the second section of the act; and the gravamen was the refusal by the conductor of the railroad company to allow the wife to ride in the ladies' car for the reason as stated in one of the counts, that she was a person of African descent. The jury rendered a verdict for the defendants in this case, upon the merits, under a charge of the court to which a bill of exceptions was taken by the plaintiffs.

The case was tried on the assumption by both parties of the validity of the act of Congress; and the principal point made by the exceptions was, that the judge allowed evidence to go to the jury tending to show that the conductor had reason to suspect that the plaintiff, the wife, was an improper person, because she was in company with a young man whom he supposed to be a white man, and on that account inferred that there was some improper connection between them; and the judge charged the jury, in substance, that if this was the conductor's *bona fide* reason for excluding the woman from the car they might take it into consideration on the question of the liability of the company. The case was brought here by writ of error at the suit of the plaintiffs. The cases of Stanley, Nichols, and Singleton, came up on certificates of division of opinion between the judges below as to the constitutionality of the first and second sections of the act referred to; and the case of Ryan, on a writ of error to the

judgment of the Circuit Court for the District of California sustaining a demurrer to the information.

The Stanley, Ryan, Nichols, and Singleton cases were submitted together, by the Solicitor-General at the last term of court, on the 7th day of November, 1882. There were no appearances and no briefs filed for the defendants.

The Robinson case was submitted on the briefs at the last term, on the 29th day of March, 1883. . . .

Mr. Justice BRADLEY delivered the opinion of the court. After stating the facts in the above language he continued:

It is obvious that the primary and important question in all the cases is the constitutionality of the law: for if the law is unconstitutional none of the prosecutions can stand.

The sections of the law referred to provide as follows:

"SEC. 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

"SEC. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offense forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: Provided, That all persons may elect to sue for the penalty aforesaid, or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this provision shall not apply to criminal proceedings, either under this Act or the criminal law of any State: And provided further, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively."

Are these sections constitutional? The first section, which is the principal one, cannot be fairly understood without attending to the last clause, which qualifies the preceding part.

The essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, and theatres; but that such enjoyment shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. In other words, it is the purpose of the law to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theatres, and other places of public amusement, no distinction shall be made between citizens of different race or color, or between those who have, and those who have not, been slaves. Its effect is to declare, that in all inns, public conveyances, and places of amusement, colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by white citizens; and vice versa. The second section makes it a penal offense in any person to deny to any citizen of any race or color, regardless of previous servitude, any of the accommodations or privileges mentioned in the first section.

Has Congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments. The power is sought, first, in the Fourteenth Amendment, and the views and arguments of distinguished Senators, advanced whilst the law was under consideration, claiming authority to pass it by virtue of that amendment, are the principal arguments adduced in favor of the power. We have carefully considered those arguments, as was due to the eminent ability of those who put them forward, and have felt, in all its force, the weight of authority which always invests a law that Congress deems itself competent to pass. But the responsibility of an independent judgment is now thrown upon this court; and we are bound to exercise it according to the best lights we have.

The first section of the Fourteenth Amendment (which is the one relied on), after declaring who shall be citizens of the United

States, and of the several States, is prohibitory in its character, and prohibitory upon the States. It declares that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect: and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect. A quite full discussion of this aspect of the amendment may be found in *United States v. Cruikshank*,

92 U. S., 542; *Virginia v. Rives*, 100 U. S., 313; and *Ex parte Virginia*, 100 U. S., 339.

An apt illustration of this distinction may be found in some of the provisions of the original Constitution. Take the subject of contracts, for example. The Constitution prohibited the States from passing any law impairing the obligation of contracts. This did not give to Congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did, however, give the power to provide remedies by which the impairment of contracts by State legislation might be counteracted and corrected and this power was exercised. The remedy which Congress actually provided was that contained in the 25th section of the Judiciary Act of 1789, 1 Stat., 85, giving to the Supreme Court of the United States jurisdiction by writ of error to review the final decisions of State courts whenever they should sustain the validity of a State statute or authority alleged to be repugnant to the Constitution or laws of the United States. By this means, if a State law was passed impairing the obligation of a contract and the State tribunals sustained the validity of the law, the mischief could be corrected in this court. The legislation of Congress, and the proceedings provided for under it, were corrective in their character. No attempt was made to draw into the United States courts the litigation of contracts generally; and no such attempt would have been sustained. We do not say that the remedy provided was the only one that might have been provided in that case. Probably Congress had power to pass a law giving to the courts of the United States direct jurisdiction over contracts alleged to be impaired by a State law; and under the broad provisions of the act of March 3d, 1875, ch. 137, 18 Stat., 470, giving to the circuit courts jurisdiction of all cases arising under the Constitution and laws of the United States, it is possible that such jurisdiction now exists. But under that, or any other law, it must appear as well by allegation, as proof at the trial, that the Constitution had been violated by the action of the State legislature. Some obnoxious State law passed, or that might be passed, is necessary to be assumed in order to lay the foundation of any federal remedy in the case; and for the very

sufficient reason, that the constitutional prohibition is against state laws impairing the obligation of contracts.

And so in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority. Of course, legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, State laws, or State action of some kind, adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that, because the denial by a state to any persons, of the equal protection of the laws is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking. It is not necessary for us to state, if we could, what legislation would be proper for Congress to adopt. It is sufficient for us to examine whether the law in question is of that character.

An inspection of the law shows that it makes no reference what-

ever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offenses, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities.

If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? If it is supposable that the States may deprive persons of life, liberty and property without due process of law (and the amendment itself does not suppose this), why should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances, and theatres? The truth is, that the implication of a power to legislate in this manner is based upon the assumption that if the States are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such State legislation or action. The assumption is certainly unsound. It is repugnant to the Tenth Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

We have not overlooked the fact that the fourth section of the

act now under consideration has been held by this court to be constitutional. That section declares "that no citizen, possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars." In *Ex parte Virginia*, 100 U. S., 339, it was held that an indictment against a State officer under this section for excluding persons of color from the jury list is sustainable. But a moment's attention to its terms will show that the section is entirely corrective in its character. Disqualifications for service on juries are only created by the law, and the first part of the section is aimed at certain disqualifying laws, namely, those which make mere race or color a disqualification; and the second clause is directed against those who, assuming to use the authority of the State government, carry into effect such a rule of disqualification. In the Virginia case, the State, through its officer, enforced a rule of disqualification which the law was intended to abrogate and counteract. Whether the statute-book of the State actually laid down any such rule of disqualification, or not, the State, through its officer, enforced such a rule; and it is against such State action, through its officers and agents, that the last clause of the section is directed. This aspect of the law was deemed sufficient to divest it of any unconstitutional character, and makes it differ widely from the first and second sections of the same act which we are now considering.

These sections, in the objectionable features before referred to, are different also from the law ordinarily called the "Civil Rights Bill," originally passed April 9th, 1866, 14 Stat., 27, ch. 31, and re-enacted with some modifications in sections 16, 17, and 18, of the Enforcement Act, passed May 31st, 1870, 16 Stat., 140, ch. 114. That law, as re-enacted, after declaring that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of per-

sons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding, proceeds to enact, that any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any rights secured or protected by the preceding section (above quoted), or to different punishment, pains, or penalties, on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and subject to fine and imprisonment as specified in the act. This law is clearly corrective in its character, intended to counteract and furnish redress against State laws and proceedings and customs having the force of law, which sanction the wrongful acts specified. In the Revised Statutes, it is true, a very important clause, to wit, the words "any law, statute, ordinance, regulation or custom to the contrary notwithstanding," which gave the declaratory section its point and effect, are omitted; but the penal part, by which the declaration is enforced, and which is really the effective part of the law, retains the reference to State laws, by making the penalty apply only to those who should subject parties to a deprivation of their rights under color of any statute, ordinance, custom, etc., of any State or Territory: thus preserving the corrective character of the legislation. Rev. St., §§ 1977, 1978, 1979, 5510. The Civil Rights Bill here referred to is analogous in its character to what a law would have been under the original Constitution, declaring that the validity of contracts should not be impaired, and that if any person bound by a contract should refuse to comply with it, under color or pretense that it had been rendered void or invalid by a State law, he should be liable to an action upon it in the courts of the United States, with the addition of a penalty for setting up such an unjust and unconstitutional defense.

In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual,

unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow-citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some State law or State authority for its excuse and perpetration.

Of course, these remarks do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the State, as in the regulation of commerce with foreign nations, among the several States, and with the Indian tribes, the coining of money, the establishment of postoffices and post-roads, the declaring of war, etc. In these cases Congress has power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof. But where a subject is not submitted to the general legislative power of Congress, but is only

submitted thereto for the purpose of rendering effective some prohibition against particular State legislation or State action in reference to that subject, the power given is limited by its object, and any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited State laws or proceedings of State officers.

If the principles of interpretation which we have laid down are correct, as we deem them to be (and they are in accord with the principles laid down in the cases before referred to, as well as in the recent case of *United States v. Harris*, 106 U. S., 629), it is clear that the law in question cannot be sustained by any grant of legislative power made to Congress by the Fourteenth Amendment. That amendment prohibits the States from denying to any person the equal protection of the laws, and declares that Congress shall have power to enforce, by appropriate legislation, the provisions of the amendment. The law in question, without any reference to adverse State legislation on the subject, declares that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances, and places of public amusement, and imposes a penalty upon any individual who shall deny to any citizen such equal accommodations and privileges. This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces State legislation on the same subject, or only allows it permissive force. It ignores such legislation, and assumes that the matter is one that belongs to the domain of national regulation. Whether it would not have been a more effective protection of the rights of citizens to have clothed Congress with plenary power over the whole subject, is not now the question. What we have to decide is, whether such plenary power has been conferred upon Congress by the Fourteenth Amendment; and, in our judgment, it has not.

We have discussed the question presented by the law on the assumption that a right to enjoy equal accommodation and privileges in all inns, public conveyances, and places of public amusement, is one of the essential rights of the citizen which no State can abridge or interfere with. Whether it is such a right, or not, is a different question which, in the view we have taken

of the validity of the law on the ground already stated, it is not necessary to examine.

We have also discussed the validity of the law in reference to cases arising in the States only; and not in reference to cases arising in the Territories or the District of Columbia, which are subject to the plenary legislation of Congress in every branch of municipal regulation. Whether the law would be a valid one as applied to the Territories and the District is not a question for consideration in the cases before us: they all being cases arising within the limits of States. And whether Congress, in the exercise of its power to regulate commerce amongst the several States, might or might not pass a law regulating rights in public conveyances passing from one State to another, is also a question which is not now before us, as the sections in question are not conceived in any such view.

But the power of Congress to adopt direct and primary, as distinguished from corrective legislation, on the subject in hand, is sought, in the second place, from the Thirteenth Amendment, which abolishes slavery. This amendment declares "that neither slavery, nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction;" and it gives Congress power to enforce the amendment by appropriate legislation.

This amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.

It is true that slavery cannot exist without law, any more than property in lands and goods can exist without law: and, therefore, the Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery. But it

has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States: and upon this assumption it is claimed, that this is sufficient authority for declaring by law that all persons shall have equal accommodations and privileges in all inns, public conveyances, and places of amusement; the argument being, that the denial of such equal accommodations and privileges is, in itself, a subjection to a species of servitude within the meaning of the amendment. Conceding the major proposition to be true, that Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents, is the minor proposition also true, that the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance, or a theatre, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery? If it does not, then power to pass the law is not found in the Thirteenth Amendment.

In a very able and learned presentation of the cognate question as to the extent of the rights, privileges and immunities of citizens which cannot rightfully be abridged by State laws under the Fourteenth Amendment, made in a former case, a long list of burdens and disabilities of a servile character, incidental to feudal vassalage in France, and which were abolished by the decrees of the National Assembly, was presented for the purpose of showing that all inequalities and observances exacted by one man from another were servitudes, or badges of slavery, which a great nation, in its effort to establish universal liberty, made haste to wipe out and destroy. But these were servitudes imposed by the old law or by long custom, which had the force of law, and exacted by one man from another without the latter's consent. Should any such servitudes be imposed by a State law, there can be no doubt that the law would be repugnant to the Fourteenth, no less than to the Thirteenth, Amendment; nor any greater doubt that Congress has adequate power to forbid any such servitude from being exacted.

But is there any similarity between such servitudes and a de-

nial by the owner of an inn, a public conveyance, or a theatre, of its accommodations and privileges to an individual, even though the denial be founded on the race or color of that individual? Where does any slavery or servitude, or badge of either, arise from such an act of denial? Whether it might not be a denial of a right which, if sanctioned by the State law, would be obnoxious to the prohibitions of the Fourteenth Amendment, is another question. But what has it to do with the question of slavery?

It may be that by the Black Code (as it was called), in the times when slavery prevailed, the proprietors of inns and public conveyances were forbidden to receive persons of the African race, because it might assist slaves to escape from the control of their masters. This was merely a means of preventing such escapes, and was no part of the servitude itself. A law of that kind could not have any such object now, however justly it might be deemed an invasion of the party's legal right as a citizen, and amenable to the prohibitions of the Fourteenth Amendment.

The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses. Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens. Whether this legislation was fully authorized by the Thirteenth Amendment alone, without the support which it afterward received from the Fourteenth Amendment, after the adoption of which it was re-enacted with some additions, it is not necessary to inquire. It is referred to

for the purpose of showing that at that time (in 1866) Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.

We must not forget that the province and scope of the Thirteenth and Fourteenth Amendments are different; the former simply abolished slavery: the latter prohibited the States from abridging the privileges or immunities of citizens of the United States; from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the Thirteenth Amendment, it has only to do with slavery and its incidents. Under the Fourteenth Amendment, it has power to counteract and render nugatory all State laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty or property without due process of law, or to deny to any of them the equal protection of the laws. Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not; under the Fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings.

The only question under the present head, therefore, is, whether the refusal to any persons of the accommodations of an inn, or a public conveyance, or a place of public amusement, by an individual, and without any sanction or support from any State law or regulation, does inflict upon such persons any manner of servitude, or form of slavery, as those terms are understood in this country? Many wrongs may be obnoxious to the prohibitions of the Fourteenth Amendment which are not, in any just sense, incidents or elements of slavery. Such, for example, would be the

taking of private property without due process of law; or allowing persons who have committed certain crimes (horse-stealing, for example) to be seized and hung by the *posse comitatus* without regular trial; or denying to any person, or class of persons, the right to pursue any peaceful avocations allowed to others. What is called class legislation would belong to this category, and would be obnoxious to the prohibitions of the Fourteenth Amendment, but would not necessarily be so to the Thirteenth, when not involving the idea of any subjection of one man to another. The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery. The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.

Now, conceding, for the sake of the argument, that the admission to an inn, a public conveyance, or a place of public amusement, on equal terms with all other citizens, is the right of every man and all classes of men, is it any more than one of those rights which the States by the Fourteenth Amendment are forbidden to deny to any person? And is the Constitution violated until the denial of the right has some State sanction or authority? Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery, or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears?

After giving to these questions all the consideration which their importance demands, we are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the State; or if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which Congress has adopted, or may adopt, for counteracting the effect of State laws, or State action, prohibited by the Fourteenth Amendment. It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person

may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business. Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodations to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the Fourteenth Amendment, Congress has full power to accord a remedy under that amendment and in accordance with it.

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens; yet no one, at that time, thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the Thirteenth Amendment (which merely abolishes slavery), but by force of the Thirteenth [Fourteenth?] and Fifteenth Amendments.

On the whole, we are of opinion, that no countenance of authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendments of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several States is concerned.

This conclusion disposes of the cases now under consideration. In the cases of the *United States v. Michael Ryan*, and of *Richard*

A. Robinson and Wife v. The Memphis & Charleston Railroad Company, the judgments must be affirmed. In the other cases, the answer to be given will be that the first and second sections of the act of Congress of March 1st, 1875, entitled "An Act to protect all citizens in their civil and legal rights," are unconstitutional and void, and that judgment should be rendered upon the several indictments in those cases accordingly.

And it is so ordered.

Mr. Justice HARLAN delivered a dissenting opinion.

HURTADO v. CALIFORNIA.

110 U. S. 516. 1884.

The Constitution of the State of California, adopted in 1879, in Article I, section 8, provides as follows:

"Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment without such examination and commitment as may be prescribed by law. A grand jury shall be summoned at least once a year in each county." . . .

Hurtado, having been charged with murder by an information filed with the District Attorney, was tried by jury, convicted, and sentenced to be hanged. Thereupon he filed certain objections to the execution of the sentence, one of which recited "that the said plaintiff in error had been held to answer for the said crime of murder by the district attorney of the said county of Sacramento, upon an information filed by him, and had been tried and illegally found guilty of said crime, without any presentment or indictment of any grand or other jury, and that the judgment rendered upon the alleged verdict of the jury in such case was and is void, and if executed would deprive the plaintiff in error of his life or liberty without due process of law."

Mr. Justice MATTHEWS delivered the opinion of the court. After reciting the facts in the foregoing language, he continued:

It is claimed on behalf of the prisoner that the conviction and sentence are void, on the ground that they are repugnant to that clause of the Fourteenth Article of Amendment of the Constitution of the United States which is in these words:

“Nor shall any State deprive any person of life, liberty, or property without due process of law.”

The proposition of law we are asked to affirm is that an indictment or presentment by a grand jury as known to the common law of England, is essential to that “due process of law,” when applied to prosecutions for felonies, which is secured and guaranteed by this provision of the Constitution of the United States, and which accordingly it is forbidden to the States respectively to dispense with in the administration of criminal law. . . . [Here follow citations from *Kalloch v. Superior Court*, 56 Cal., 229, and *Rowan v. The State*, 30 Wis., 129.]

On the other hand, it is maintained on behalf of the plaintiff in error that the phrase “due process of law” is equivalent to “law of the land,” as found in the 29th chapter of *Magna Charta*; that by immemorial usage it has acquired a fixed, definite, and technical meaning; that it refers to and includes, not only the general principles of public liberty and private right, which lie at the foundation of all free government, but the very institutions which, venerable by time and custom, have been tried by experience and found fit and necessary for the preservation of those principles, and which, having been the birthright and inheritance of every English subject, crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the State; that, having been originally introduced into the Constitution of the United States as a limitation upon the powers of the government, brought into being by that instrument, it has now been added as an additional security to the individual against oppression by the States themselves; that one of these institutions is that of the grand jury, an indictment or presentment by which against the accused in cases of alleged felonies is an essential part of due process of law, in order that he may not be harassed or destroyed by prosecutions founded only upon private malice or popular fury.

This view is certainly supported by the authority of the great name of Chief Justice Shaw and of the court in which he presided, which, in *Jones v. Robbins*, 8 Gray, 329, decided that the 12th article of the Bill of Rights of Massachusetts, a transcript of *Magna Charta* in this respect, made an indictment or presentment of a grand jury essential to the validity of a conviction in cases of prosecutions for felonies. In delivering the opinion of

the court in that case, MERRICK, J., alone dissenting, the Chief Justice said:

"The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury, in case of high offenses, is justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty. . . . It having been stated," he continued, "by Lord Coke, that by the 'law of the land' was intended a due course of proceeding according to the established rules and practice of the courts of common law, it may, perhaps, be suggested that this might include other modes of proceeding sanctioned by the common law, the most familiar of which are, by informations of different kinds, by the officers of the crown in the name of the King. But, in reply to this, it may be said that Lord Coke himself explains his own meaning by saying 'the law of the land,' as expressed in Magna Charta, was intended due process of law, that is, by indictment or presentment of good and lawful men. And further, it is stated on the authority of Blackstone, that informations of every kind are confined by the constitutional law to misdemeanors only. 4 Bl. Com., 310." . . .

This view of the meaning of Lord Coke is the one taken by MERRICK, J., in his dissenting opinion in *Jones v. Robbins*, 8 Gray, 329, who states his conclusions in these words:

"It is the forensic trial, under a broad and general law, operating equally upon every member of our community, which the words 'by the law of the land,' in Magna Charta, and in every subsequent declaration of rights which has borrowed its phraseology, make essential to the safety of the citizen, securing thereby both his liberty and his property, by preventing the unlawful arrest of his person or any unlawful interference with his estate." See also *State v. Starling*, 15 Rich. (S. C.), Law, 120.

Mr. Reeve, in 2 History of Eng. Law, 43, translates the phrase, *nisi per legale iudicium parium suorum vel per legem terræ*.

"But by the judgment of his peers, or by some other legal process of proceeding adapted by the law to the nature of the case."

Chancellor Kent, 2 Com., 13, adopts this mode of construing the phrase. Quoting the language of Magna Charta, and referring to Lord Coke's comment upon it, he says:

"The better and larger definition of due process of law is that it means law in its regular course of administration through courts of justice."

This accords with what is said in *Westervelt v. Gregg*, 12 N. Y., 202, by Denio, J., p. 212:

"The provision was designed to protect the citizen against all mere acts of power, whether flowing from the legislative or executive branches of the government."

The principal and true meaning of the phrase has never been more tersely or accurately stated than by Mr. Justice JOHNSON, in *Bank of Columbia v. Okely*, 4 Wheat., 235-244:

"As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

And the conclusion rightly deduced is, as stated by Mr. Cooley, *Constitutional Limitations*, 356:

"The principles, then, upon which the process is based, are to determine whether it is 'due process' or not, and not any considerations of mere form. Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen."

It is urged upon us, however, in argument, that the claim made in behalf of the plaintiff in error is supported by the decision of this court in *Murray's Lessee v. Hoboken Land & Improvement Company*, 18 How., 272. There Mr. Justice CURTIS delivering the opinion of the court, after showing, p. 276, that due process of law must mean something more than the actual existing law of the land, for otherwise it would be no restraint upon legislative power, proceeds as follows:

"To what principle, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions.

If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

This, it is argued, furnishes an indispensable test of what constitutes "due process of law"; that any proceeding otherwise authorized by law, which is not thus sanctioned by usage, or which supersedes and displaces one that is, cannot be regarded as due process of law.

But this inference is unwarranted. The real syllabus of the passage quoted is, that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law. The point in the case cited arose in reference to a summary proceeding, questioned on that account, as not due process of law. The answer was: however exceptional it may be, as tested by definitions and principles of ordinary procedure, nevertheless, this, in substance, has been immemorially the actual law of the land, and, therefore, is due process of law. But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.

This would be all the more singular and surprising, in this quick and active age, when we consider that, owing to the progressive development of legal ideas and institutions in England, the words of Magna Charta stood for very different things at the time of the separation of the American colonies from what they represented originally. . . .

This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law. Sir James Mackintosh ascribes this principle of development to Magna Charta itself. To use his own language:

"It was a peculiar advantage that the consequences of its principles were, if we may so speak, only discovered slowly and gradually. It gave out on each occasion only so much of the spirit

of liberty and reformation as the circumstances of succeeding generations required and as their character would safely bear. For almost five centuries it was appealed to as the decisive authority on behalf of the people, though commonly so far only as the necessities of each case demanded." 1 Hist. of England, 221.

The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice,—*sum cuique tribuere*. There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.

The concessions of Magna Charta were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to Lord Coke in *Bonham's Case*, 8 Rep., 115, 118a, the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.

In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.

Restraints that could be fastened upon executive authority with precision and detail, might prove obstructive and injurious when imposed on the just and necessary discretion of legislative power; and, while in every instance, laws that violated express and specific injunctions and prohibitions might, without embarrassment, be judicially declared to be void, yet, any general principle or maxim, founded on the essential nature of law, as a just and reasonable expression of the public will and of government, as instituted by popular consent and for the general good, can only be applied to cases coming clearly within the scope of its spirit and purpose, and not to legislative provisions merely establishing forms and modes of attainment. Such regulations, to adopt a sentence of Burke's, "may alter the mode and application, but have no power over the substance of original justice." Tract on the Popery Laws, 6 Burke's Works, ed. Little & Brown, 323.

Such is the often-repeated doctrine of this court. . . . [Here are given quotations from *Munn v. Ill.*, 94 U. S., 113; *Walker v. Savinet*, 92 U. S., 90; *Kennard v. Louisiana*, 92 U. S., 480; *Davidson v. N. O.*, 96 U. S., 97.]

We are to construe this phrase in the Fourteenth Amendment by the *usus loquendi* of the Constitution itself. The same words are contained in the Fifth Amendment. That article makes spe-

cific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions for the more aggravated crimes under the laws of the United States. It declares that:

“No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be witness against himself.” [It then immediately adds:] “Nor be deprived of life, liberty, or property without due process of law.”

According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is, that in the sense of the Constitution, “due process of law” was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense and with no greater extent; and that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their

pleasure. . . . [Here follows a citation from *Missouri v. Lewis*, 101 U. S., 22-31.]

But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but in the language of Mr. Webster, in his familiar definition, "the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," so "that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society;" and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its objects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government.

The Supreme Court of Mississippi, in a well-considered case,—*Brown v. Levee Commissioners*, 50 Miss., 468,—speaking of the meaning of the phrase "due process of law," says: "The principle does not demand that the laws existing at any point of time shall be irrevocable, or that any forms of remedies shall necessarily continue. It refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded in the proceedings by which a person is condemned to the loss of

life, liberty, or property, then the deprivation has not been by 'due process of law.' " . . . [Here follows a citation from *Loan Association v. Topeka*, 20 Wallace, 655-662.]

It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.

The Constitution of Connecticut, adopted in 1818 and in force when the Fourteenth Amendment took effect, requires an indictment or presentment of a grand jury only in cases where the punishment of the crime charged is death or imprisonment for life, and yet it also declares that no person shall "be deprived of life, liberty, or property but by due course of law." It falls short, therefore, of that measure of protection which it is claimed is guaranteed by Magna Charta to the right of personal liberty; notwithstanding which it is no doubt justly said in Swift's digest, 17, that

"This sacred and inestimable right, without which all others are of little value, is enjoyed by the people of this State in as full extent as in any country on the globe, and in as high a degree as is consistent with the nature of civil government. No individual or body of men has a discretionary or arbitrary power to commit any person to prison: no man can be restrained of his liberty, be prevented from removing himself from place to place as he chooses, be compelled to go to a place contrary to his inclination, or be in any way imprisoned or confined, unless by virtue of the express laws of the land."

Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law. It is, as we have seen, an ancient proceeding at common law, which might include every case of an offense of less grade than a felony, except misprision of treason; and in every circumstance of its administration, as authorized by the statute of California, it carefully considers and guards the substantial interest of the prisoner. It is merely a preliminary pro-

ceeding, and can result in no final judgment, except as a consequence of a regular judicial trial, conducted precisely as in cases of indictments.

In reference to this mode of proceeding at the common law, and which he says "is as ancient as the common law itself," Blackstone adds (4 Com., 305):

"And as to those offenses in which informations were allowed as well as indictments, so long as they were confined to this high and respectable jurisdiction, and were carried on in a legal and regular course in his Majesty's Court of King's Bench, the subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment."

For these reasons, finding no error therein, the judgment of the Supreme Court of California is *Affirmed.*

Mr. Justice HARLAN rendered a dissenting opinion.

FONG YUE TING v. UNITED STATES.

WONG QUAN v. UNITED STATES.

LEE JOE v. UNITED STATES.

Supreme Court of the United States. 1893.
(149 U. S. 698.)

These were three writs of *habeas corpus*, granted by the Circuit Court of the United States for the Southern District of New York, upon petitions of Chinese laborers, arrested and held by the marshal of the district for not having certificates of residence, under section 6 of the Act of May 5, 1892, c. 60, which is copied in the margin. . . .

Each petition alleged that the petitioner was arrested and detained without due process of law, and that section 6 of the Act of May 5, 1892, was unconstitutional and void.

In each case, the Circuit Court, after a hearing upon the writ of *habeas corpus* and the return of the marshal, dismissed the writ of *habeas corpus* and allowed an appeal of the petitioner to this court, and admitted them to bail pending the appeal.

All the proceedings from the arrest to the appeal, took place on May 6.

Mr. Joseph H. Choate and Mr. J. Hubley Ashton, for appellants.

Mr. Maxwell Evarts was on Mr. Choate's brief.

Mr. Solicitor-General for appellees.

Mr. Justice GRAY, after stating the facts, delivered the opinion of the court.

The general principles of public law which lie at the foundation of these cases are clearly established by previous judgments of this court, and by the authorities referred to.

In the recent case of *Nishimura Ekiu v. United States*, 142 U. S. 651, 659, the court in sustaining the action of the executive department, putting in force an act of Congress for the exclusion of aliens, said, "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States, this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress."

The same views were more fully expounded in the earlier case of *Chae Chan Ping v. United States*, 130 U. S. 581, in which the validity of a former Act of Congress, excluding Chinese laborers from the United States, under the circumstances herein stated, was affirmed.

In the elaborate opinion delivered by Mr. Justice Field, in behalf of the court, it was said, "Those laborers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power." "The United States, in their rela-

tion to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory." 130 U. S. 603, 604. . . .

The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps toward becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.

This is clearly affirmed in dispatches referred to by the court in *Chae Chan Ping's Case*. In 1856, Mr. Marcy wrote, "Every society possesses the undoubted right to determine who shall compose its members and it is exercised by all nations, both in peace and war. A memorable example of the exercise of this power in time of peace was the passage of the alien law of the United States in the year 1798." In 1869, Mr. Fish wrote, "The control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the State, are too clearly within the essential attributes of sovereignty to be seriously contested." Wharton's *International Law Digest*, § 206; 30 U. S. 607.

The statement of leading commentators on the law of nations are to the same effect. . . .

The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation essential to its safety, its independence and its welfare, the question now before the court is whether the manner in which Congress has exercised this right in sections 6 and 7 of the Act of 1892, is consistent with the Constitution.

The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and make it effective. The only government of this country, which other nations recognize or treat with, is the government of a Union; and the only American flag known throughout the world is the flag of the United States.

The Constitution of the United States speaks with no uncer-

tain sound upon this subject. That instrument, established by the people of the United States as the fundamental law of the land, has conferred upon the President the executive power; has made him the commander-in-chief of the army and navy: has authorized him, by and with the consent of the senate, to make treaties, and to appoint ambassadors, public ministers, and counsel; and has made it his duty to take care that the laws be faithfully executed. The constitution has granted to Congress the power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, to provide and maintain a navy, and to make rules for the government and the regulation of the land and naval forces; and to make all laws necessary and proper for carrying into execution these powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. And the several States are expressly forbidden to enter into any treaties, alliance, or confederation; to grant letters of marque and reprisal; to enter into any agreement or compact with another State or with a foreign power; or to engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

In exercising the great power which the people of the United States by establishing a written constitution as a supreme and paramount law had vested in this court of determining, whenever the question is properly brought before it, whether the acts of the legislature or of the executive are consistent with the constitution, it behooves the court to be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the constitution to other departments of the governments.

The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government and is to be regulated by treaties or by Acts of Congress, and to be executed by the executive authority

according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the constitution to intervene.

In *Nishimura Ekiu's Case*, it was adjudged that, although Congress might, if it saw fit, authorize the courts to investigate and ascertain the facts upon which the alien's right to land was made by the statutes to depend, yet Congress might entrust the final determination of those facts to an executive officer, and that, if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency. 142 U. S. 660.

The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power.

The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which the alien's right to be in the country has been made by Congress to depend. . . .

In our jurisprudence, it is well settled that the provisions of an act of Congress, passed in the exercise of its constitutional authority, on this, as on any other subject, if clear and explicit, must be upheld by the courts, even in contravention of express stipulations in earlier treaty. As was said by this court, in *Chae Chan Ping's Case* following previous decisions: "The treaties were of no greater legal obligations than the act of Congress. By the constitution, laws made in pursuance thereof, and treaties made under the authority of the United States, are both declared to be the supreme law of the land and no paramount authority is given to one over the other. A treaty, it is true, is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed, in that particular only, the equivalent of a legis-

lative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control." "So far as the treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal." 130 U. S. 600. See also *Foster v. Nelson*, 2 Pet. 253, 314; *Edye v. Robertson*, 112 U. S. 580, 597-599; *Whitney v. Robertson*, 124 U. S. 190.

By the supplementary act of October 1, 1888, c. 1064, it was enacted in section 1, that "from and after the passage of this act, it shall be unlawful for any Chinese laborer, who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed or shall depart therefrom, and shall not have returned before the passage of this Act, to return to, or remain in, United States;" and in section 2, that "no certificates of identity, provided for in the 4th and 5th section of the Act to which this is a supplement shall hereafter be issued; and every certificate heretofore issued in pursuance thereof is hereby declared void and of no effect, and the Chinese laborer claiming admission by virtue thereof, shall not be permitted to enter the United States." 25 Stat. 504.

By the law of nations, doubtless, aliens residing in a country, with the intention of making it a permanent place of abode, acquire, in one sense, a domicile there; and, while they are permitted by the nations to retain such a residence and domicile, are subject to its laws, and may invoke its protection against other nations. This is recognized by those publicists, as has been seen, maintaining in the strongest terms the right of the nation to expel any or all aliens at its pleasure. Vattel, Lib. 1, c. 19, § 213; 1 Phillimore, a. 18 § 321; Mr. Marcy, in *Kosza's Case*, Wharton's International Law Digest, § 198. See also *Lau Ow Bew v. United States*, 144 U. S. 47, 62; Merlin, *Repertoire de Jurisprudence*, Domicile, § 13, quoted in the case, above cited, of *In re Adam*, 1 Moore, P. C. 460, 472, 473.

Chinese laborers, therefore, like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Con-

stitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility. But they continue to be aliens, having taken no steps towards becoming citizens, and incapable of becoming such under the naturalization laws; and therefore remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interests. . . .

The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States, being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject.

In each of these cases the judgment of the circuit court, dismissing the writ of *habeas corpus*, is right and must be

Affirmed.

BREWER, J., FIELD, J., and FULLER, C. J., dissented.

CHAPTER XI.

THE RELATION OF THE UNITED STATES TO PORTO RICO AND THE PHILIPPINE ISLANDS.

THE CONSTITUTION DOES NOT EXTEND IN ITS ENTIRETY TO TERRITORY ACQUIRED BY CONQUEST.

THE INSULAR TARIFF CASES.

DE LIMA v. BIDWELL.

182 U. S. 1. (*Decided May 27th, 1901.*)

Statement by Mr. Justice BROWN.

This was an action originally instituted in the supreme court of the State of New York by the firm of D. A. DeLima & Co. against the collector of the port of New York, to recover back duties alleged to have been legally exacted and paid under protest upon certain importations of sugar from San Juan, in 1899, and subsequent to the cession of the island to the United States.

Upon petition of the collector, and pursuant to Rev. Stat., Sec. 643, the case was removed by certiorari to the circuit court of the United States, in which the defendant appeared and demurred to the complaint upon the ground that it did not state a cause of action, and also that the court had no jurisdiction of the case. The demurrer was sustained upon both grounds, and the action dismissed. Hence this writ of error.

In this and the following cases, which may be collectively designated as the "Insular Tariff Cases," the dates here given become material:

In July, 1898, Porto Rico was invaded by the military force of the United States under General Miles.

On August 12, 1898, during the progress of the campaign, a protocol was entered into between the Secretary of State and the French Ambassador on the part of Spain, providing for a suspension of hostilities, the cession of the island, and the conclusion of a treaty of peace. 30 Stat. at L. 1742.

On October 18 Porto Rico was evacuated by the Spanish forces.

On December 10, 1898, such treaty was signed at Paris (under which Spain ceded to the United States the island of Porto Rico), was ratified by the President and Senate February 6, 1899, and by the Queen Regent of Spain, March 19, 1899. 30 Stat. at L. 1754.

On March 2, 1899, an Act was passed making an appropriation to carry out the obligations of the treaty.

On April 11, 1899, the ratifications were exchanged and the treaty proclaimed at Washington.

On April 12, 1900, an act was passed, commonly called the Foraker act, to provide temporary revenues and a civil government for Porto Rico, which took effect May 1, 1900. . . .

Mr. Justice BROWN delivered the opinion of the court.

This case raises the single question whether territory acquired by the United States by cession from a foreign power remains a "foreign country" within the meaning of the tariff laws.

2. Whether these cargoes of sugar were subject to duty depends solely upon the question whether Porto Rico was a "foreign country" at the time the sugars were shipped, since the tariff act of July 24, 1897 (30 Stat. at L. 151, chap. II), commonly known as the Dingley act, declares that "there shall be levied, collected and paid upon all articles imported from foreign countries" certain duties therein specified. A foreign country was defined by Mr. Chief Justice Marshall and Mr. Justice Story to be one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States. *The Eliza*, 2 Gall. 4, Fed. Cas. No. 4,346; *Taber v. United States*, 1 Story, 1, Fed. Cas. No. 13,722; *The Adventure*, 1 Brock. 235, 241, Fed. Cas. No. 93.

The status of Porto Rico was this: the island had been for some months under military occupation by the United States as a conquered country, when, by the 2d article of the treaty of peace between the United States and Spain, signed December 10, 1898, and ratified April 11, 1899, Spain ceded to the United States the island of Porto Rico, which has ever since remained in our possession and has been governed and administered by us. If the case depended solely upon these facts, and the questions

were broadly presented whether a country which has been ceded to us, the cession accepted, possession delivered, and the island occupied and administered without interference by Spain or any other power, was a foreign country or domestic territory, it would seem that there could be as little hesitation in answering this question as there would be in determining the ownership of a house deeded in fee simple to a purchaser who had accepted the deed, gone into possession, paid taxes, and made improvements without let or hindrance from his vendee. But it is earnestly insisted by the government that it never could have been the intention of Congress to admit Porto Rico into a customs union with the United States, and that, while the island may be to a certain extent, domestic territory, it still remains a "foreign country" under the tariff laws until Congress has embraced it within the general revenue system. . . .

From this *resume* of the decisions of this court, the instructions of the executive departments, and the above act of congress, it is evident that, from 1803, the date of Mr. Gallatin's letter, to the present time, there is not a shred of authority, except the dictum in *Fleming v. Page* (9 How. 603) practically overruled in *Cross v. Harrison*, for holding that a district *ceded to and in the possession of* the United States remains for any purpose a foreign country. Both these conditions must exist to produce a change of nationality for revenue purposes. Possession is not alone sufficient as was held in *Fleming v. Page*; nor is a treaty ceding such territory sufficient without a surrender of possession. *Keen v. McDonough*, 8 Pet. 308, 8 L. ed. 490, 516; *Hallett v. Doe ex dem.* Hunt, 7 Ala. 899; *The Fama*, 5 c. Rob. 106. The practice of the executive departments thus continued for more than half a century, is entitled to great weight, and should not be disregarded nor overturned except for cogent reasons, and unless it be clear that such constructions be erroneous. *United States v. Johnston*, 124 U. S. 31, L. ed. 389, 8 Sup. Ct. Rep. 446, and other cases cited.

But were this presented as an original question we should be impelled irresistibly to the same conclusion. . . .

Territory thus acquired can remain a foreign country under the tariff laws only upon one or two theories; either that the word "foreign" applies to such countries as were foreign at the time the statute was enacted, notwithstanding any subsequent

change in their condition, or that they remained foreign under the tariff laws until Congress has formally embraced them within the customs union of the States. The first theory is obviously untenable. While a statute is presumed to speak from the time of its enactment, it embraces all such persons or things as subsequently fall within its scope, and ceases to apply to such as thereafter fall without its scope. Thus, a statute forbidding the sale of liquors to minors applies not only to minors in existence at the time the statute was enacted, but to all who are subsequently born, and ceases to apply to such as thereafter reach their majority. So, when the constitution of the United States declares in Art. 1, Sec. 10, that the State shall not do certain things, this declaration operates, not only upon the thirteen original states, but upon all who subsequently become such; and when Congress places certain restrictions upon the powers of a territorial legislature, such restrictions cease to operate the moment such territory is admitted as a State. By parity of reasoning a country ceases to be foreign the instant it becomes domestic. . . .

The theory that a country remains foreign in respect to the tariff laws until Congress has acted by embracing it within the customs union, presupposes that a country may be domestic for one purpose and foreign for another. It may undoubtedly become necessary, for the adequate administration of a domestic territory, to pass a special act, providing the proper machinery and officers, as the President would have no authority, except under the war power, to administer it himself, but no act is necessary to make it domestic territory if once it has been ceded to the United States. We express no opinion as to whether Congress is bound to appropriate the money to pay for it. . . .

We are therefore of opinion that at the time these duties were levied, Porto Rico was not a foreign country within the meaning of the tariff laws, but a territory of the United States, that the duties were illegally exacted, and that the plaintiffs are entitled to recover them back.

The judgment of the Circuit Court for the Southern District of New York is therefore reversed, and the case remanded to that court for further proceedings in consequence of this opinion.

Mr. Justice GRAY dissented, stating the decision of the court

was irreconcilable with *Fleming v. Pake*, 9 How. 603, and the opinions of the majority of the justices in *Downs v. Bidwell*, 182 U. S. 244, decided the same day.

Mr. Justice MCKENNA gave a dissenting opinion, concurred in by Justices SHIRAS and WHITE, in which they hold:

"We said at the offset that it could be demonstrated that Porto Rico occupied a relation to the United States, between that of being a foreign country absolutely and of being domestic territory absolutely and because of that relation, its products were subject to the duties imposed by the Dingley act, and, concluding, we say we believe that, in this opinion and the one referred to, we have made that demonstration; made it from the Constitution itself, the immediate and continued practice under the Constitution, judicial authority, and the treaty with Spain. And that demonstration does more than declare the legality of the duties as levied upon the sugars of the plaintiff in error. It vindicates the government from national and international weakness. It exhibits the Constitution as a charter of great and vital authorities, with limitation indeed, but with such limitations as serve and assist government, not destroy it which, though fully enforced, yet enable the United States to have—what it was intended to have—"an equal station among the powers of the earth," and to do all "Acts and things which independent states may of right do,"—and confidently do, able to secure the fullest fruits of their performance. All powers of government, placed in harmony under the Constitution; the rights and liberties of every citizen secured, put to no hazard or loss or impairment, the power of the nation also secured in its great station, enabled to move with strength and dignity and effect among the other nations of the earth, to such purpose as it may undertake or to such destiny as it may be called.

The judgment of the circuit court should be *affirmed*.

DOWNES v. BIDWELL.

182 U. S. 244. Decided May 27th, 1901. L

In error to the circuit court to the United States for the Southern District of New York, to review a judgment sustaining a demurrer to a complaint in the action to recover back duties paid under protest on importations from Porto Rico under the Foraker act,

Affirmed.

Statement by Mr. Justice BROWN:

This was an action begun in the circuit court by Downes, doing business under the firm name of S. B. Downes & Co., against the collector of the port of New York, to recover back duties to the amount of \$639.35, exacted and paid under protest upon certain oranges consigned to the plaintiff at New York and brought thither from the port of San Juan in the island of Porto Rico during the month of November, 1900, after the passage of the act temporarily providing a civil government and revenues for the island of Porto Rico, known as the Foraker act.

The district attorney demurred to the complaint for the want of jurisdiction in the court and for insufficiency of its averments. The demurrer was sustained, and the complaint dismissed. Whereupon plaintiffs sued out this writ of error. . . .

Mr. Justice BROWN announced the conclusion and judgment of the court:

This case involves the question whether merchandise brought into the ports of New York from Porto Rico since the passage of the Foraker act is exempt from duty, notwithstanding the 3d section of that act, which requires a payment of "15 per centum of the duties which are to be required to be levied, collected and paid on like articles of merchandise imported from foreign countries."

2. In the case of *De Lima v. Bidwell*, just decided, 182 U. S., we held that, upon the ratification of the treaty of peace with Spain, Porto Rico ceased to be a foreign country, and became a territory of the United States, and that duties were no longer collectible upon merchandise brought from that island. We are now asked to hold that it became a part of the United States within that provision of the Constitution which declares that "all duties, imposts, and excises shall be uniform throughout the

United States." Art. I, Sec. 8. If Porto Rico be a part of the United States, the Foraker act imposing duties upon its products is unconstitutional, not only by reason of violation of uniformity clause, but because by Sec. 9. "Vessels bound to or from one state" cannot "be obliged to enter, clear, or pay duties in another."

The case also involves the broader question, whether the revenue clauses of the Constitution extend of their own force to our newly acquired territories. The Constitution itself does not answer the question. Its solution must be found in the nature of the government created by that instrument in the opinion of its contemporaries, in the practical construction put upon it by Congress and by the decisions of this court. . . .

Eliminating, then, from the opinions of this court all expressions unnecessary to the disposition of the particular case, and gleaning therefrom the exact point decided in each, the following propositions may be considered as established:

1. That the District of Columbia and the territories are not States within the judicial clause of the Constitution, giving jurisdiction in cases between citizens of the different States.

2. That territories are not states within the meaning of the revised statutes, Sec. 709, permitting writs of error from this court in cases where the validity of a *state* statute is drawn in question.

3. That the District of Columbia and the territories are States as that word is used in treaties, with foreign powers, with respect to the ownership, disposition, and inheritance of property.

4. That the territories are not within the clause of the Constitution, providing for the creation of a Supreme Court, and such inferior courts as Congress may see fit to establish.

5. That the Constitution does not apply to foreign countries or to trials therein conducted, and that Congress may lawfully provide for such trials, before consular tribunals, without the intervention of a grand or petit jury.

6. That where the Constitution has once formally extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith. . . .

It is obvious that in the annexation of outlying and distant possessions, grave questions will arise from differences from rates, habits, laws, and customs of the people, and from differences of

soil, climate and production which may require action on the part of Congress, that would be quite unnecessary in the annexation of contiguous territory, inhabited only by people of the same race, or by scattered bodies of native Indians. . . .

Whatever may be finally decided by the American people as to the status of these islands and their inhabitants, whether they shall be introduced into the sisterhood of states, or be permitted to form independent governments,—it does not follow that in the meantime, awaiting that decision, the people are in the matter of personal rights unprotected by the provisions of our constitution and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty and property. . . .

The liberality of Congress in legislating the Constitution into all our contiguous territories has undoubtedly fostered the impression that it went there by its own force, but there is nothing in the Constitution itself and little in the interpretation put upon it to confirm that impression. There is not even an analogy to the provisions of an ordinary mortgage, for its attachment to after-acquired property, without which it covers only property existing at the date of the mortgage. In short, there is absolute silence upon the subject. The executive and legislative departments of the government, have for more than a century interpreted this silence as precluding the idea that the Constitution attached to these territories as soon as acquired, and unless such interpretation be manifestly contrary to the letter or spirit of the Constitution it should be followed by the judicial department. . . .

We are therefore of the opinion that the island of Porto Rico is a territory appurtenant and belonging to the United States but not a part of the United States within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it imposes duties upon imports from such islands and that the plaintiff cannot recover back the duties exacted in this case.

The judgment of the circuit court is therefore affirmed.

Mr. Justice WHITE gave an affirming opinion, concurred in by Mr. Justice SHIRAS and Mr. Justice MCKENNA.

Mr. Justice GRAY also concurred in the opinion of the court.

Mr. Chief Justice FULLER gave a dissenting opinion, concurred in by Mr. Justice BREWER and Mr. Justice PECKHAN.

Mr. Justice HARLAN gave a strong dissenting opinion, concurrent in the dissenting opinion of the chief justice. He concluded: "It would seem according to the theories of some, that even if Porto Rico is in and of the United States for many important purposes, it is yet not a part of this country if the privilege of protesting against the rule of taxation which Congress is expressly forbidden by the Constitution from adopting as to any part of the 'United States.' And this result comes from the failure of Congress to use the word 'incorporate' in the Foraker act, although by the same act all power exercised by the civil government in Porto Rico is by authority of United States, and although this court has been given jurisdiction by writ of error or appeal to re-examine the final judgments of the district court of the United States, established by Congress for that territory. Suppose Congress had passed this act: '*Be it enacted by the Senate and House of Representatives in Congress assembled, that Porto Rico be and is incorporated into the United States as a territory,*' would such a statute have enlarged the scope or effect of the Foraker act? Would such a statute have accomplished more than a Foraker act has done? Indeed, would not such legislation have been regarded as most extraordinary as well as unnecessary?

I am constrained to say that this idea of 'incorporation' has occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel.

In my opinion Porto Rico, became, at least after the ratification of the treaty with Spain, a part of and subject to the jurisdiction of the United States in respect of all its territory and people, and that Congress could not thereafter impose any duty, impost, or excise with respect to that island and its inhabitants which departed from the rule of uniformity established by the Constitution."

**FOURTEEN DIAMOND RINGS, PEPKE CLAIMANT, v.
UNITED STATES.**

183 U. S. 176. (Decided Dec. 2nd, 1901.)

[In this case the ruling of the court in *De Lima v. Bidwell*, 182 U. S. 1, was affirmed and applied. Pepke, a citizen of the United States, and of the State of North Dakota, having become a volunteer infantryman, was assigned to duty in the Island of Luzon in the Philippine Islands. September 25th, 1899, he was discharged at San Francisco. He had brought with him fourteen diamond rings from the Philippines. In May, 1900, these rings were seized by a customs officer in Chicago as having been imported contrary to law. Pepke set up the facts and claimed the rings were not subject to customs duties. The lower court held the plea insufficient and ordered the sale of the rings. Pepke then prosecuted a writ of error to the Supreme Court.]

Chief Justice FULLER rendered the decision of the court.

Were these rings, acquired by the soldier after the ratification of the treaty was proclaimed, when brought by him from Luzon to California, on his return with his regiment to be discharged, imported from a foreign country?

The question has already been answered in the negative, in respect of Porto Rico, in *De Lima v. Bidwell*, 182 U. S. 1, and unless the cases can be distinguished, which we are of opinion they cannot be in this particular, that decision is controlling.

The Philippines, like Porto Rico, became, by virtue of the treaty, ceded conquered territory, or territory ceded by way of indemnity. The territory ceased to be situated as Castine was when occupied by the British forces in the war of 1812, or as Tampico was when occupied by the troops of the United States during the Mexican war, cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was part. *Thorington v. Smith*, 8 Wall. 10. The Philippines were not simply occupied but acquired, and having been granted and delivered to the United States, by their former master, were no longer under the sovereignty of any foreign nation. . . .

It is further contended that a distinction exists in that while complete possession of Porto Rico was taken by the United States, this was not so as to the Philippines, because of the armed resistance of the native inhabitants to a greater or less extent.

We must decline to assume that the government wishes to thus disparage the title of the United States, or to place itself in the position of waging a war of conquest. . . .

We do not understand that it is claimed that in carrying on the pending hostilities the government is seeking to subjugate the people of a foreign country, but, on the contrary, that it is preserving order and suppressing insurrection in territory of the United States. It follows that the possession of the United States is adequate possession under legal title, and this cannot be asserted for one purpose and denied for another. We dismiss the suggested distinction as untenable.

But it is sought to detract from the weight of the ruling in *De Lima v. Bidwell* because one of the five justices concurring in the judgment in that case concurred in the judgment in *Downes v. Bidwell*, 182 U. S. 244. . . .

The ruling in the case of *De Lima* remains unaffected and controls that under consideration—and this is so notwithstanding four members of the majority in the *De Lima* case were of opinion that Porto Rico did not become by the cession subjected to the exercise of governmental power in the levy of duties unrestricted by constitutional limitations.

Decree reversed and cause remanded with directions to quash the information.

[Mr. Justice BROWN gave a concurring opinion. Messrs. Justices GRAY, SHIRAS, WHITE and McKENNA dissented for reasons stated in their opinions in *De Lima v. Bidwell*, 182 U. S. 1, and *Downes v. Bidwell*, 182 U. S. 222.]

APPENDIX.

RELATION BETWEEN THE UNITED STATES AND THE STATES.

TEXAS v. WHITE, ET AL.

7 *Wallace*, 700. 1868.

The Chief Justice delivered the opinion of the court.

This is an original suit in this court, in which the State of Texas, claiming certain bonds of the United States as her property, asks an injunction to restrain the defendants from receiving payment from the National government, and to compel the surrender of the bonds to the State.

It appears from the bill, answers, and proofs, that the United States, by act of September 9, 1850, offered to the State of Texas, in compensation for her claims connected with the settlement of her boundary, \$10,000,000 in five per cent. bonds, each for the sum of \$1,000; and that this offer was accepted by Texas. One-half of these bonds were retained for certain purposes in the National treasury, and the other half were delivered to the State. The bonds thus delivered were dated January 1, 1851, and were all made payable to the State of Texas, or bearer, and redeemable after the 31st day of December, 1864. They were received in behalf of the State by the comptroller of public accounts, under authority of an act of the legislature, which, besides giving that authority, provided that no bond should be available in the hands of any holder until after indorsement by the governor of the State.

After the breaking out of the rebellion, the insurgent legislature of Texas, on the 11th of January, 1862, repealed the act requiring the indorsement of the governor (Acts of Texas, 1862 p. 45), and on the same day provided for the organization of a military board, composed of the governor, comptroller, and treasurer; and authorized a majority of that board to provide for the defense of the State by means of any bonds in the treasury, upon any account, to the extent of \$1,000,000 (Texas Laws. 55). The

defense contemplated by the act was to be made against the United States by war. Under this authority the military board entered into an agreement with George W. White and John Chiles, two of the defendants, for the sale to them of one hundred and thirty-five of these bonds, then in the treasury of the State, and seventy-six more, than deposited with Droege & Co., in England; in payment for which they engaged to deliver to the board a large quantity of cotton cards and medicines. This agreement was made on the 12th of January, 1865. On the 12th of March, 1865, White and Chiles received from the military board one hundred and thirty-five of these bonds, none of which were indorsed by any governor of Texas. Afterward, in the course of the years 1865 and 1866, some of the same bonds came into the possession of others of the defendants, by purchase, or as security for advances of money.

Such is a brief outline of the case. It will be necessary hereafter to refer more in detail to some particular circumstances of it.

The first inquiries to which our attention was directed by counsel, arose upon the allegations of the answer of Chiles (1) that no sufficient authority is shown for the prosecution of the suit in the name and on the behalf of the State of Texas; and (2) that the State, having severed her relations with a majority of the States of the Union, and having by her ordinance of secession attempted to throw off her allegiance to the Constitution and government of the United States, has so far changed her status as to be disabled from prosecuting suits in the National courts.

The first of these allegations is disproved by the evidence. A letter of authority, the authenticity of which is not disputed, has been produced, in which J. W. Throckmorton, elected governor under the constitution adopted in 1866, and proceeding under an act of the State legislature relating to these bonds, expressly ratifies and confirms the action of the solicitors who filed the bill, and empowers them to prosecute this suit; and it is further proved by the affidavit of Mr. Paschal, counsel for the complainant, that he was duly appointed by Andrew J. Hamilton, while provisional governor of Texas, to represent the State of Texas in reference to the bonds in controversy, and that his appointment has been renewed by E. M. Pease, the actual governor. If Texas was a State of the Union at the time of these acts, and these per-

sons or either of them, were competent to represent the State, this proof leaves no doubt about the question of authority.

The other allegation presents a question of jurisdiction. It is not questioned that this court has original jurisdiction of suits by States against citizens of other States, or that the States entitled to invoke this jurisdiction must be States of the Union. But, it is equally clear that no such jurisdiction has been conferred upon this court of suits by any other political communities than such States.

If, therefore, it is true that the State of Texas was not at the time of filing this bill, or is not now, one of the United States, we have no jurisdiction of this suit, and it is our duty to dismiss it. . . .

It [the word state] describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government. . . .

In the Constitution the term state most frequently expresses the combined idea just noticed, of people, territory, and government. A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such states, under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and states which compose it one people and one country. . . .

In all respects, so far as the objects could be accomplished by ordinances of the convention, by acts of the legislature, and by votes of the citizens, the relations of Texas to the Union were broken up, and new relations to a new government were established for them.

The position thus assumed could only be maintained by arms, and Texas accordingly took part, with the other Confederate States, in the war of the rebellion, which these events made inevitable. During the whole of that war there was no governor, or

judge, or any other State officer in Texas, who recognized the National authority. Nor was any officer of the United States permitted to exercise any authority whatever under the National government within the limits of the States, except under the immediate protection of the National military forces.

Did Texas, in consequence of these acts, cease to be a State? Or, if not, did the State cease to be a member of the Union?

It is needless to discuss, at length, the question whether the right of a State to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the Constitution of the United States.

The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to "be perpetual." And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?

But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation, each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that "the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence," and that "without the States in union, there could be no such political body as the United States." (*County of Lane v. The State of Oregon*, 7 Wallace, 76.) Not only therefore can there be no loss of separate and independent autonomy to the States, through their union and under the Con-

stitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all of its provisions, looks to an indestructible Union, composed of indestructible States.

When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union and all the guarantees of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.

Considered therefore as transacted under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation.

Our conclusion therefore is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred. And this conclusion, in our judgment, is not in conflict with any act or declaration of any department of the National government, but entirely in accordance with the whole series of such acts and declarations since the first outbreak of the rebellion.

But in order to the exercise, by a State, of the right to sue in this court, there needs to be a State government, competent to represent the State in its relations with the National government,

so far at least as the institution and prosecution of a suit is concerned.

And it is by no means a logical conclusion, from the premises which we have endeavored to establish, that the governmental relations of Texas to the Union remained unaltered. Obligations often remain unimpaired, while relations are greatly changed. The obligations of allegiance to the State, and of obedience to her laws, subject to the Constitution of the United States, are binding upon all citizens, whether faithful or unfaithful to them; but the relations which subsist while these obligations are performed, are essentially different from those which arise when they are disregarded and set at naught. And the same must necessarily be true of the obligations and relations of States and citizens to the Union. No one has been bold enough to contend that, while Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, senators chosen by her legislature, or representatives elected by her citizens, were entitled to seats in Congress; or that any suit, instituted in her name, could be entertained in this court. All admit that, during this condition of civil war, the rights of the State as a member, and of her people as citizens, of the Union, were suspended. The government and the citizens of the State, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion.

These new relations imposed new duties upon the United States. The first was that of suppressing the rebellion. The next was that of re-establishing the broken relations of the State with the Union. The first of these duties having been performed, the next necessarily engaged the attention of the National government.

The authority for the performance of the first had been found in the power to suppress insurrection and carry on war; for the performance of the second, authority was derived from the obligation of the United States to guarantee to every State in the Union a republican form of government. The latter, indeed, in the case of a rebellion which involves the government of a State, and for the time excludes the National authority from its limits, seems to be a necessary complement to the former.

Of this, the case of Texas furnishes a striking illustration. When the war closed there was no government in the State except that which had been organized for the purpose of waging

war against the United States. That government immediately disappeared. The chief functionaries left the State. Many of the subordinate officials followed their example. Legal responsibilities were annulled or greatly impaired. It was inevitable that great confusion should prevail. If order was maintained, it was where the good sense and virtue of the citizens gave support to local acting magistrates, or supplied more directly the needful restraints.

A great social change increased the difficulty of the situation. Slaves, in the insurgent States, with certain local exceptions, had been declared free by the Proclamation of Emancipation; and whatever questions might be made as to the effect of that act, under the Constitution, it was clear, from the beginning, that its practical operation, in connection with legislative acts of like tendency, must be complete enfranchisement. Wherever the National forces obtained control, the slaves became freemen. Support to the acts of Congress and the proclamation of the President, concerning slaves, was made a condition of amnesty (13 Stats. at Large, 737) by President Lincoln, in December, 1863, and by President Johnson, in May, 1865 (*Ib.*, 758). And emancipation was confirmed, rather than ordained, in the insurgent States, by the amendment to the Constitution prohibiting slavery throughout the Union, which was proposed by Congress in February, 1865, and ratified, before the close of the following autumn, by the requisite three-fourths of the States (*Ib.*, 774, 775).

The new freemen necessarily became part of the people, and the people still constituted the State; for States, like individuals, retain their identity, though changed to some extent in their constituent elements. And it was the State, thus constituted, which was now entitled to the benefit of the constitutional guarantee.

There being then no government in Texas in constitutional relations with the Union, it became the duty of the United States to provide for the restoration of such a government. But the restoration of the government which existed before the rebellion, without a new election of officers, was obviously impossible; and before any such election could be properly held, it was necessary that the old Constitution should receive such amendments as would conform its provisions to the new conditions created by emancipation, and afford adequate security to the people of the State.

In the exercise of the power conferred by the guarantee clause,

as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.

It is not important to review, at length, the measures which have been taken, under this power, by the executive and legislative departments of the National government. It is proper, however, to observe that almost immediately after the cessation of organized hostilities, and while the war yet smouldered in Texas, the President of the United States issued his proclamation appointing a provisional governor for the State, and providing for the assembling of a convention, with a view to the re-establishment of a republican government, under an amended constitution, and to the restoration of the State to her proper constitutional relations. A convention was accordingly assembled, the constitution amended, elections held, and a State government, acknowledging its obligations, to the Union, established.

Whether the action then taken was, in all respects, warranted by the Constitution, it is not now necessary to determine. The power exercised by the President was supposed, doubtless, to be derived from his constitutional functions, as commander-in-chief; and, so long as the war continued, it cannot be denied that he might institute temporary government within insurgent districts, occupied by the National forces, or take measures, in any State, for the restoration of State government faithful to the Union, employing, however, in such efforts, only such means and agents as were authorized by constitutional laws.

But the power to carry into effect the clause of guarantee is primarily a legislative power, and resides in Congress. "Under the fourth article of the Constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State, before it can determine whether it is republican or not."

This is the language of the late Chief Justice, speaking for this court, in a case from Rhode Island (*Luther v. Borden*, 7 Howard,

42), arising from the organization of opposing governments in that State. And we think that the principle sanctioned by it may be applied, with even more propriety, to the case of a State deprived of all rightful government, by revolutionary violence; though necessarily limited to cases where the rightful government is thus subverted, or in imminent danger of being overthrown by an opposing government, set up by force within the State.

The action of the President must, therefore, be considered as provisional, and, in that light, it seems to have been regarded by Congress. It was taken after the term of the 38th Congress had expired. The 39th Congress, which assembled in December, 1865, followed by the 40th Congress, which met in March, 1867, proceeded, after long deliberation, to adopt various measures for reorganization and restoration. These measures were embodied in proposed amendments to the Constitution, and in the acts known as the Reconstruction Acts, which have been so far carried into effect that a majority of the States which were engaged in the rebellion have been restored to their constitutional relations, under forms of government, adjudged to be republican by Congress, through the admission of their "Senators and Representatives into the councils of the Union."

Nothing in the case before us requires the court to pronounce judgment upon the constitutionality of any particular provision of these acts.

But it is important to observe that these acts themselves show that the governments, which had been established and had been in actual operation under executive direction, were recognized by Congress as provisional, as existing, and as capable of continuance.

By the act of March 2, 1867 (14 Stats. at Large, 428), the first of the series, these governments were, indeed, pronounced illegal and were subjected to military control, and were declared to be provisional only; and by the supplementary act of July 19, 1867, the third of the series, it was further declared that it was the true intent and meaning of the act of March 2, that the governments then existing were not legal State governments, and if continued, were to be continued subject to the military commanders of the respective districts and to the paramount authority of Congress. We do not inquire here into the constitutionality of this legislation so far as it relates to military authority, or to the

paramount authority of Congress. It suffices to say, that the terms of the acts necessarily imply recognition of actually existing governments; and that in point of fact, the governments thus recognized, in some important respects, still exist.

What has thus been said generally describes, with sufficient accuracy, the situation of Texas. A provisional governor of the State was appointed by the President in 1865; in 1866 a governor was elected by the people under the constitution of that year; at a subsequent date a governor was appointed by the commander of the district. Each of the three exercised executive functions and actually represented the State in the executive department.

In the case before us each has given his sanction to the prosecution of the suit, and we find no difficulty, without investigating the legal title of either to the executive office, in holding that the sanction thus given sufficiently warranted the action of the solicitor and counsel in behalf of the State. The necessary conclusion is that the suit was instituted and is prosecuted by competent authority.

The question of jurisdiction being thus disposed of, we proceed to the consideration of the merits as presented by the pleadings and the evidence. . . .

On the whole case, therefore, our conclusion is that the State of Texas is entitled to the relief sought by her bill, and a decree must be made accordingly.

Mr. Justice GRIER dissenting. I regret that I am compelled to dissent from the opinion of the majority of the court on all the points raised and to be decided in this case.

The first question in order is the jurisdiction of the court to entertain this bill in behalf of the State of Texas.

The original jurisdiction of this court can be invoked only by one of the United States. The Territories have no such right conferred on them by the Constitution, nor have the Indian tribes who are under the protection of the military authorities of the government.

Is Texas one of these United States? Or was she such at the time this bill was filed, or since?

This is to be decided as a political fact, not as a legal fiction. This court is bound to know and notice the public history of the nation.

If I regard the truth of history for the last eight years, I can-

not discover the State of Texas as one of these United States. I do not think it necessary to notice any of the very astute arguments which have been advanced by the learned counsel in this case, to find the definition of a State, when we have the subject treated in a clear and common-sense manner by Chief Justice MARSHALL, in the case of *Hepburn & Dundas v. Ellzey* (2 Cranch, 452). As the case is short, I hope to be excused for a full report of it, as stated and decided by the court. He says:

“The question is, whether the plaintiffs, as residents of the District of Columbia, can maintain an action in the Circuit Court of the United States for the District of Virginia. This depends on the act of Congress describing the jurisdiction of that court. The act gives jurisdiction to the Circuit Courts in cases between a citizen of the State in which the suit is brought, and a citizen of another State. To support the jurisdiction in this case, it must appear that Columbia is a State. On the part of the plaintiff, it has been urged that Columbia is a distinct political society, and is, therefore, a ‘State’ according to the definition of writers on general law. This is true; but as the act of Congress obviously uses the word ‘State’ in reference to that term as used in the Constitution, it becomes necessary to inquire whether Columbia is a State in the sense of that instrument. The result of that examination is a conviction that the members of the American Confederacy only are the States contemplated in the Constitution. The House of Representatives is to be composed of members chosen by the people of the several States, and each State shall have at least one representative. ‘The Senate of the United States shall be composed of two senators from each State.’ Each State shall appoint, for the election of the executive, a number of electors equal to its whole number of senators and representatives. These clauses show that the word ‘State’ is used in the Constitution as designating a member of the Union, and excludes from the term the signification attached to it by writers on the law of nations.”

Now we have here a clear and well-defined test by which we may arrive at a conclusion with regard to the questions of fact now to be decided.

Is Texas a State, now represented by members chosen by the people of that State and received on the floor of Congress? Has she two senators to represent her as a State in the Senate of the

United States? Has her voice been heard in the late election of President? Is she not now held and governed as a conquered province by military force? The act of Congress of March 2d, 1867, declares Texas to be a "rebel State," and provides for its government until a legal and republican State government could be legally established. It constituted Louisiana and Texas the fifth military district, and made it subject, not to the civil authority, but to the "military authorities of the United States."

It is true that no organized rebellion now exists there, and the courts of the United States now exercise jurisdiction over the people of that province. But this is no test of the State's being in the Union; Dakota is no State, and yet the United States administer justice there as they do in Texas. The Indian tribes, who are governed by military force, cannot claim to be States of the Union. Wherein does the condition of Texas differ from theirs?

Now, by assuming or admitting as a fact the present status of Texas as a State not in the Union politically, I beg leave to protest against any charge of inconsistency as to judicial opinions heretofore expressed as a member of this court, or silently assented to. I do not consider myself bound to express any opinion judicially as to the constitutional right of Texas to exercise the rights and privileges of a State of this Union, or the power of Congress to govern her as a conquered province, to subject her to military domination, and keep her in pupillage. I can only submit to the fact as decided by the political position of the government; and I am not disposed to join in any essay to prove Texas to be a State of the Union, when Congress have decided that she is not. It is a question of fact, I repeat, and of fact only. Politically, Texas is not a State in this Union. Whether rightfully out of it or not is a question not before the court. . . .

Mr. Justice SWAYNE: I concur with my brother Grier as to the incapacity of the State of Texas, in her present condition, to maintain an original suit in this court. The question, in my judgment, is one in relation to which this court is bound by the action of the legislative department of the government.

Upon the merits of the case, I agree with the majority of my brethren.

I am authorized to say that my brother MILLER unites with me in these views.

FEDERAL INJUNCTIONS AGAINST BOYCOTTS.

IN RE DEBS, PETITIONER.

158 U. S. 564. 1895.

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On July 2, 1894, the district attorney for the Northern District of Illinois, acting under the direction of the Attorney-General of the United States, filed a bill of complaint in the Circuit Court of the United States for the Northern District of Illinois against these petitioners and others. The bill averred that the twenty-two railroads named therein were engaged in the business of interstate commerce and also that each of them was under contract to carry the United States mails; that four of the defendants were officers of the American Railway Union; that these four officers combined with others to compel an adjustment of a dispute between the Pullman Palace Car Company and its employees by boycotting the cars of the company; that to make the boycott effective, they had prevented certain of the railroads running out of Chicago from operating their trains, and were combining to extend such boycott against the Pullman cars by causing strikes among employees of all roads attempting to haul the same; that the defendants and others unknown proceeded by collecting together in large numbers, by threat, intimidation, force and violence, to prevent the said railways from employing other persons to fill the vacancies aforesaid; that the defendants and others unknown did with force and violence obstruct, derail, and wreck the engines and trains of the said railways, both passenger and freight, engaged in interstate commerce and in carrying the United States mails. Following these allegations was a prayer for an injunction. The court thereupon ordered an injunction commanding the defendants "and all persons combining and conspiring with them, and all other persons whomsoever absolutely to desist and refrain from" doing the unlawful acts specified in the bill. The injunction was served on those of the defendants who are here as petitioners. On July 17 the district attorney filed an information for an attachment against the four defendants, and on August 1 a similar information against the

other petitioners. A hearing was had before the Circuit Court, and on December 14, these petitioners were found guilty of contempt and sentenced to imprisonment in the county jail for terms varying from three to six months. Having been committed to jail, they on January 14, 1895, applied to this court for a writ of error and also a writ of *habeas corpus*. The former was denied on the ground that the order of the Circuit Court was not a final judgment or decree. The latter is now to be considered.

Mr. Justice BREWER . . . delivered the opinion of the court.

The case presented by the bill is this: The United States, finding that the interstate transportation of persons and property, as well as the carriage of the mails, is forcibly obstructed, and that a combination and conspiracy exists to subject the control of such transportation to the will of the conspirators, applied to one of their courts, sitting as a court of equity, for an injunction to restrain such obstruction and prevent carrying into effect such conspiracy. Two questions of importance are suggested: First. Are the relations of the general government to interstate commerce and the transportation of the mails such as to authorize a direct interference to prevent a forcible obstruction thereof? Second. If authority exists, as authority in government implies both power and duty, has a court of equity jurisdiction to issue an injunction in aid of the performance of such duty?

First. What are the relations of the general government to interstate commerce and the transportation of the mails? They are those of direct supervision, control, and management. While under the dual system which prevails with us the powers of government are distributed between the State and the Nation, and while the latter is properly styled a government of enumerated powers, yet within the limits of such enumeration it has all the attributes of sovereignty, and, in the exercise of those enumerated powers, acts directly upon the citizen, and not through the intermediate agency of the State.

"The government of the Union, then, is, emphatically and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

"No trace is to be found in the Constitution of an intention

to create a dependence of the government of the Union on those of the States for the execution of the great powers assigned to it. Its means are adequate to its ends, and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the Constitution." Chief Justice MARSHALL in *McCulloch v. Maryland*, 4 Wheat., 316, 405, 424.

"Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the confederate government, which acted with powers, greatly restricted, only upon the States." Chief Justice CHASE in *Lane County v. Oregon*, 7 Wall., 71, 76.

"We hold it be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

"This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the Constitution itself show which is to yield. 'This Constitution, and all laws which shall be made in pursuance thereof, . . . shall be the supreme law of the land.' " Mr. Justice BRADLEY in *Ex parte Siebold*, 100 U. S., 371, 395. . . .

Among the powers expressly given to the national government are the control of interstate commerce and the creation and management of a post office system for the nation. . . . [Here follows a consideration of the statutes passed in the exercise of these powers.]

Obviously these powers given to the national government over interstate commerce and in respect to the transportation of the

mails were not dormant and unused. Congress had taken hold of these two matters, and by various and specific acts had assumed and exercised the powers given to it, and was in full discharge of its duty to regulate interstate commerce and carry the mails. The validity of such exercise and the exclusiveness of its control had been again and again presented to this court for consideration. It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of state legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a State to legislate in such a manner as to obstruct interstate commerce. If a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?

As, under the Constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and Congress by virtue of such grant has assumed actual and direct control, it follows that the national government may prevent any unlawful and forcible interference therewith. But how shall this be accomplished? Doubtless, it is within the competency of Congress to prescribe by legislation that any interference with these matters shall be offenses against the United States, and prosecuted and punished by indictment in the proper courts. But is that the only remedy? Have the vast interests of the nation in interstate commerce, and in the transportation of the mails, no other protection than lies in the possible punishment of those who interfere with it? To ask the question is to answer it. By article 3, section 2, clause 3, of the Federal Constitution it is provided: "The trial of all crimes except in cases of impeachment shall be by jury; and such trial shall be held in the State where the said crime shall have been committed." If all the inhabitants of a State, or even a great body of them, should combine to obstruct interstate commerce or the transportation of the mails, prosecutions for such offenses had in such a community would be doomed in advance to failure. And if the certainty of such failure was known, and the national government had no other way to enforce the freedom of interstate commerce and the transportation of the mails than by prosecution and punish-

ment for interference therewith, the whole interests of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single State.

But there is no such impotency in the national government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws.

But passing to the second question, is there no other alternative than the use of force on the part of the executive authorities whenever obstructions arise to the freedom of interstate commerce or the transportation of the mails? Is the army the only instrument by which rights of the public can be enforced and the peace of the nation preserved? Grant that any public nuisance may be forcibly abated either at the instance of the authorities, or by any individual suffering private damage therefrom, the existence of this right of forcible abatement is not inconsistent with nor does it destroy the right of appeal in an orderly way to the courts for a judicial determination, and an exercise of their powers by writ of injunction and otherwise to accomplish the same result. . . .

So, in the case before us, the right to use force does not exclude the right of appeal to the courts for a judicial determination and for the exercise of all their powers of prevention. Indeed, it is more to the praise than to the blame of the government, that, instead of determining for itself questions of right and wrong on the part of these petitioners and their associates and enforcing that determination by the club of the policeman and the bayonet of the soldier, it submitted all those questions to the peaceful determination of judicial tribunals, and invoked their consideration and judgment as to the measure of its rights and powers and the correlative obligations of those against whom it made complaint. And it is equally to the credit of the latter that the judgment of those tribunals was by the great body of them respected, and the troubles which threatened so much disaster terminated.

Neither can it be doubted that the government has such an interest in the subject-matter as enables it to appear as party plaintiff in this suit. It is said that equity only interferes for the protection of property, and that the government has no property interest. A sufficient reply is that the United States have a property in the mails, the protection of which was one of the purposes of this bill. . . .

We do not care to place our decision upon this ground alone. Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligation which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it standing in the court. [Here follows a discussion of *United States v. San Jacinto Tin Co.*, 125 U. S., 273, 285, and *United States v. Bell Telephone Company*, 128 U. S., 315, 367.]

It is obvious from these decisions that while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties.

The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highway under its control.

As said in *Gilman v. Philadelphia*, 3 Wall., 718, 724: "The

power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of the offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament of England." . . .

It is said that the jurisdiction heretofore exercised by the national government over highways has been in respect to waterways—the natural highways of the country—and not over artificial highways such as railroads; but the occasion for the exercise by Congress of its jurisdiction over the latter is of recent date. Perhaps the first act in the course of such legislation is that heretofore referred to, of June 14, 1866, but the basis upon which rests its jurisdiction over artificial highways is the same as that which supports it over the natural highways. Both spring from the power to regulate commerce. The national government has no separate dominion over a river within the limits of a State; its jurisdiction there is like that over land in the same State. Its control over the river is simply by virtue of the fact that it is one of the highways of interstate and international commerce. The great case of *Gibbons v. Ogden*, 9 Wheat. 1, 197, in which the control of Congress over inland waters was asserted, rested that control on the grant of the power to regulate commerce. The argument of the Chief Justice was that commerce includes navigation, "and a power to regulate navigation is as expressly granted as if that term had been added to the word 'commerce.'" In order to fully regulate commerce with foreign nations it is essential that the power of Congress does not stop at the borders of the nation, and equally so as to commerce among the States:

"The power of Congress, then, comprehends navigation within the limits of every State in the Union, so far as that navigation may be, in any manner, connected with 'commerce with foreign

nations, or among the several States, or with the Indian tribes.' It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies."

See also *Gilman v. Philadelphia*, 3 Wall., 713, 725, in which it was said: "Wherever 'commerce among the States' goes, the power of the nation, as represented in this court, goes with it to protect and enforce its rights."

Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Congress and the cases in the courts have been principally concerned therewith. The fact that in recent years interstate commerce has come mainly to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of Congress over such commerce. On the contrary, the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.

Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same today as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop. . . .

We have given to this case the most careful and anxious attention, for we realize that it touches closely questions of supreme importance to the people of this country. Summing up our conclusions, we hold that the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty; that to it is committed power over interstate commerce and the transmission of the mail:

that the powers thus conferred upon the national government are not dormant, but have been assumed and put into practical exercise by the legislation of Congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail; that while it may be competent for the government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of these courts to remove or restrain such obstructions; that the jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority; that such jurisdiction is not ousted by the fact that the obstructions are accompanied by or consist of acts in themselves violations of the criminal law; that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt; that such proceedings are not in execution of the criminal laws of the land; that the penalty for a violation of injunction is no substitute for and no defense to a prosecution for any criminal offenses committed in the course of such violation; that the complaint filed in this case clearly showed an existing obstruction of artificial highways for the passage of interstate commerce and the transmission of the mail—an obstruction not only temporarily existing, but threatening to continue; that under such complaint the Circuit Court had power to issue its process of injunction; that it having been issued and served on these defendants, the Circuit Court had authority to inquire whether its orders had been disobeyed, and when it found that they had been, then to proceed under section 725, Revised Statutes, which grants power "to punish by fine or imprisonment, . . . disobedience, . . . by any party . . . or other person, to any lawful writ, process, order, rule, decree or command," and enter the order of punishment complained of; and, finally, that the Circuit Court having full jurisdiction in the premises, its finding of the fact of disobedience is not open to review on *habeas corpus* in this or any other court. . . .

The petition for a writ of *habeas corpus* is

Denied.

